Supreme Court, U.S.
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In The

Supreme Court of the United States

BRIAN MOORE,

Petitioner,

v.

DELBERT HOSEMANN,
Mississippi Secretary of State,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 4(e)'s provision for service of process on individuals applies to official-capacity actions filed against state officers under the logic of *Ex parte Young*.

2. Whether state certification in the absence of unusual circumstances should be preferred to abstention under *Railroad Commission v. Pullman Company*.

LIST OF PARTIES

The names of all Petitioners are as follows:

Brian Moore.

The names of all Respondents are as follows:

Delbert Hosemann, in his official capacity as Mississippi Secretary of State.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Moore, petitions the Court for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit (entered December 18, 2009 with rehearing denied on January 18, 2010), reversing in part and affirming in part the District Court's dismissal of Petitioner's complaint under Federal Rule of Civil Procedure 12(c) and denying Petitioner's motion for costs and attorney's fees under Federal Rule of Civil Procedure 4(d).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Jones, C.J., Smith and DeMoss, JJ.) is reported at 591 F.3d 741 (5th Cir. 2009), and is included in the Appendix (App., *infra*, at 1). The final judgment of the United States District Court for the Southern District of Mississippi is not reported and is reproduced in the Appendix (App., *infra*, at 14). The order of the District Court denying Petitioner's motion for costs and attorney's fees is not reported and is reproduced in the Appendix (App., *infra*, at 24).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 18, 2009. Rehearing was denied on January 18, 2010.

See App., *infra,* at 26. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

U.S. Const., art. II, § 1, cl. 2:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, ...

Miss. Code § 23-15-785(2):

> The certificate of nomination by a political party convention must be signed by the presiding officer and secretary of the convention and by the chairman of the state executive committee of the political party making the nomination. Any nominating petition, to be valid, must contain the signatures as well as the addresses of the petitioners. Such certificates and petitions must be filed with the State Board of Election Commissioners by filing the same in the office of the Secretary of State not less than sixty (60) days previous to the day of the election.

Federal Rule of Civil Procedure 4(d):

> **Waiving Service.**
>
> (1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the

summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons.

. . .

(2) ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

. . .

Federal Rule of Civil Procedure 4(e):

Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Federal Rule of Civil Procedure 4(j):

Serving a Foreign, State, or Local Government.

. . .

(2) ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

STATEMENT OF THE CASE

Mississippi's legislature has provided that presidential candidates must qualify with its secretary of state "not less than sixty (60) days previous to the day of the election." Miss. Code § 23-15-785(2). For the November 2008 presidential election, this meant that candidates were required to file by September 5, 2008.

Unlike a number of election deadlines in Mississippi,[1] § 23-15-785(2) of the Mississippi Code does not include a specific time. It does not, for example, require that candidates file before 5:00 PM; nor does it require that they file by the "close of the business day."

Contrary to § 23-15-785(2)'s plain wording, Respondent, Mississippi's secretary of state, demanded that presidential candidates qualify by 5:00 PM on September 5, 2008. Because Moore, who was the 2008 presidential candidate for the Socialist Party USA,[2] attempted to file just minutes after the secretary's

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[1] Section 23-15-853(2) of the Mississippi Code, for example, requires that *congressional* candidates "qualify with the Secretary of State by 5:00 p.m. not less than twenty (20) days previous to the date of the election."

[2] Because the Socialist Party USA was not recognized in Mississippi, Moore ran under the Natural Law Party's banner. The Natural Law Party and Moore's vice-presidential candidate were also plaintiffs. Only Moore appealed the District Court's dismissal.

5:00 PM deadline on September 5, 2008, he was excluded from Mississippi's presidential ballot.

Moore brought suit under 42 U.S.C. § 1983 on September 16, 2008. In addition to preliminary relief, Moore requested permanent and declaratory relief invalidating the secretary's 5:00 PM deadline. Respondent was sued in his official capacity; Moore did not name Mississippi as a defendant.

Moore argued that the secretary lacked authority under Article II of the United States Constitution to regulate presidential elections. Section 1 of Article II states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, ..." U.S. Const., art. II, § 1, cl. 2. *See Bush v. Gore,* 531 U.S. 98, 112 (2000) (C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76 (2000) (per curiam) ("in the case of a law enacted by a state legislature applicable . . . to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution").[3] Because of Article II, Moore argued,

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[3] *See also California Democratic Party v. Jones,* 530 U.S. 567, 602 (2000) (Stevens, J., dissenting) (questioning whether California initiative regulating congressional elections "in which popular choices regarding the manner of state elections are

(Continued on following page)

the secretary could not add to or alter the legislature's plain deadline. *See, e.g., Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1012-13 (S.D. Ohio 2008) (holding that Ohio's secretary of state violated Article II by creating presidential deadline).

The District Court denied preliminary relief on September 29, 2008, and the Fifth Circuit refused an emergency stay on October 6, 2008.[4] Moore's name therefore did not appear on Mississippi's ballot.

On March 10, 2009, the District Court concluded that Moore's suit was moot and dismissed his complaint. App., *infra*, at 23. It rejected Moore's argument that the controversy fell into the well-recognized "capable of repetition" exception, explaining that "there is no 'reasonable expectation' or 'demonstrated probability' that these plaintiffs . . . will again miss what they now know to be the 5:00 p.m. deadline for filing their qualifying papers." App., *infra,* at 20-21.

On April 9, 2009, Moore filed his notice of appeal. On that same day, Moore moved the District Court to award costs and attorney's fees under Federal Rule of Civil Procedure 4(d). Moore had requested that the

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unreviewable by independent legislative action . . . [are] a valid method of exercising the power that [Article I] vests in state 'Legislature[s]'").

[4] Moore and his co-plaintiffs on December 4, 2008 voluntarily dismissed their interlocutory appeal and request for emergency relief pending in the Fifth Circuit.

secretary waive service of process. The secretary refused. Moore therefore duly served the secretary as an individual under Rule 4(e) and sought reimbursement under Rule 4(d).

The District Court on May 14, 2009, denied Moore's motion for costs as being "patently without merit." App., *infra*, at 24. Moore on June 1, 2009, amended his notice of appeal to include this May 14 order. The two appeals were consolidated in the Fifth Circuit.

The consolidated appeal was argued on November 4, 2009. The Fifth Circuit, in an opinion by Judge Smith, on December 18, 2008 reversed the lower court's dismissal but affirmed its denial of costs. App., *infra*, at 1. Judge Smith ruled that because Moore's action against the secretary was an action against Mississippi, Rule 4(j) applied. And because Rule 4(e) did not apply, Judge Smith concluded that Rule 4(d)'s waiver requirement did not apply either. *See* App., *infra*, at 13.

The court further announced *sua sponte* its intention to abstain from reaching the merits of Moore's controversy under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). App., *infra*, at 8. It also "urge[d] the district court to consider whether

to abstain on the basis of" *Pullman*, too. App., *infra*, at 8.[5]

Because *Pullman* abstention was not argued in the briefs nor addressed during oral argument, Moore petitioned for rehearing to suggest that the panel certify to the Mississippi Supreme Court the following question:

> Whether § 23-15-785(2) of the Mississippi Code requires that a recognized political party's presidential candidate's "qualifying papers" be delivered to the Mississippi Secretary of State by 5:00 PM on the day that is "sixty (60) days previous to the day of the [presidential] election."[6]

The panel denied rehearing without opinion on January 18, 2010. *See* App., *infra*, at 26-27. On

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[5] *Pullman* abstention orders are final and appealable. *See Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 714 & n. 2 (1962) (holding that *Pullman* abstention order is final and appealable); *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 8 (1983) (observing that the lower court in *Idlewild* "stayed the federal suit under the *Pullman* abstention doctrine. We held that the District Court's action was final and therefore reviewable by the Court of Appeals.") (footnote omitted).

[6] Mississippi Rule of Appellate Procedure 20(a) authorizes certification of state-law issues by the Supreme Court and United States Courts of Appeals to the Mississippi Supreme Court. *See generally Government Employees Insurance Co. v. Brown*, 446 So.2d 1002 (Miss. 1984); *Boardman v. United Services Auto Ass'n*, 470 So.2d 1024 (Miss. 1985). District Courts cannot certify issues to the Mississippi Supreme Court.

February 8, 2010, the District Court *sua sponte* abstained under *Pullman*, thereby forcing Moore to file a new round of litigation in state court.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split Over Whether Rule 4(e) Applies to State Officials Sued in Their Official Capacities for Prospective Relief Under 42 U.S.C. § 1983.

Rule 4(d) of the Federal Rules of Civil Procedure requires that defendants either waive service of process or suffer the plaintiff's costs. *See* Fed. R. Civ. P. 4(d)(2). Not all defendants, however, are required to waive service. According to Rule 4(d), only those defendants subject to service under Rules 4(e), (f), and (h) are subject to this duty. In particular, the United States, which must be served under Rule 4(i), is not subject to Rule 4(d). Likewise, state and local governmental defendants "subject to suit" are served under Rule 4(j).

The First and Second Circuits have concluded that state officials sued in their official capacities for prospective relief under 42 U.S.C. § 1983 are subject to service as individuals under Rule 4(e). The First Circuit explained in *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 29 (1st Cir. 1988), that official-capacity claims against state officials are governed by

the Rule applicable to individual service, at that time Rule 4(d)(1):[7]

> Although we imagine that in most or all cases where a state officer is sued in his official capacity, the state has a major interest in the outcome, the officer remains the actual party to the action. A state officer is often sued in his official capacity because the Eleventh Amendment forbids a direct action against the state. *See Ex Parte Young*, 209 U.S. 123 (1908).

The court explained that "[i]f the Eleventh Amendment bars an action against the state, then the latter is not 'subject to suit' pursuant to Rule 4(d)(6), and thus the rule is inapplicable." *Id.* (citing C. WRIGHT & A. MILLER, 4A FEDERAL PRACTICE & PROCEDURE § 1110 (1987)).[8] The court therefore concluded:

> The action is against an individual, albeit in his official capacity, and not against the state. Although the state . . . has a great interest in the outcome, it will be the individual . . . who in an official capacity is going to be bound by the judgment, and who can be held in contempt if a court order is disobeyed. . . . We therefore hold that service

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[7] Rule 4(d)(1)'s requirements for individual service are now included in Rule 4(e). *See Caisse v. DuBois*, 346 F.3d 213, 216 (1st Cir. 2003).

[8] Rule 4(d)(6)'s provisions for serving government are now included in Rule 4(j).

> upon a state officer in his official capacity is sufficient if made pursuant to Rule 4(d)(1).

Id. at 29-30.

The First Circuit reiterated this conclusion in *Caisse v. DuBois*, 346 F.3d 213 (1st Cir. 2003), a § 1983 prison conditions action filed against state corrections officers in both their individual and official capacities. The First Circuit expressly rejected the claim that Rule 4(j) applied: "service of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals." *Id.* at 216. The Court accordingly ruled that "to serve the defendants in either an individual or official capacity, [the plaintiff] had to comply with Fed. R. Civ. P. 4(e) providing for service of process on individuals." *Id.*

The Second Circuit has endorsed this result. In *Stoianoff v. Commissioner of Motor Vehicles*, 2000 WL 287720, 208 F.3d 204 (2d Cir. 2000) (Table), where a *pro se* plaintiff failed to comply with Rule 4(j) when serving a state official sued in his official capacity, the Second Circuit observed that "service here may be effected pursuant to Rule 4(e), which provides for service upon individuals generally. *See, e.g.*, *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28-30 (1st Cir. 1988) (holding that service on state

officer in his official capacity is sufficient if made pursuant to predecessor to Rule 4(e).").[9]

The Fifth Circuit expressly rejected the First Circuit's interpretation of Rules 4(e) and 4(j). *See* App. *infra*, at 12. It instead drew an equation between suits against federal agents, which are subject to the service requirements of Rule 4(i),[10] and suits against state officers.[11] *See* App., *infra*, at 12. "[T]he most reasonable reading of rule 4 affords state officers facing official capacity suits the same consideration given to federal officers in the same position." App., *infra*, at 12.

As pointed out by the First Circuit in *Echevarria-Gonzalez,* 849 F.2d at 29, this logic ignores the plain

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[9] Several District Courts have held that because Rule 4(e) applies to official-capacity actions under § 1983, Rule 4(d)(2)'s waiver requirement also applies. *See, e.g., Marcello v. Maine*, 238 F.R.D. 113, 115 (D. Me. 2006) (holding that § 1983 action against a state judge in his official capacity was governed by Rule 4(e) and hence Rule 4(d)); *Whatley v. District of Columbia*, 188 F.R.D. 1, 2 (D.D.C. 1999) (holding that "municipal government employees are subject to Rule 4(d)(2) of the Federal Rules of Civil Procedure when sued in both their individual and official capacities"); *Mosley v. Douglas County Correctional Center*, 192 F.R.D. 282, 283-84 (D. Neb. 2000) (same).

[10] Rule 4(i)(2) provides that when a federal officer is sued in an official capacity, the United States must be served under Rule 4(i)(1).

[11] It also relied on decisions from several District Courts holding that Rule 4(j) applies to official-capacity actions. *See* App., *infra*, at 13 n. 6. These decisions conflict with those listed in note 9, *supra*.

language of Rule 4(j), which requires that state governmental defendants must be "subject to suit" for its service requirements to apply. The law has been clear for one hundred years that states and their agencies are protected by the Eleventh Amendment; they are not subject to suit in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 16 (1890) ("The suability of a State . . . was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."). Only by suing a state official by name under the fiction of *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (stating that when sued for injunctive relief for violating the Constitution the state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct"), can one avoid the Eleventh Amendment – and this is precisely because official-capacity suits are *not* suits against states.

This constitutional distinction between states and their officials was extended as a statutory matter to § 1983 litigation in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There, this Court ruled that states are *never* proper defendants under § 1983. Rather, a § 1983 plaintiff must sue a state official by name in his official capacity. This is proper "because 'official-capacity actions for prospective relief *are not treated as actions against the State*.'" *Id.* at 71 n. 10 (quoting *Kentucky v. Graham*, 473 U.S.

159, 167 n. 14 (1985); citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)) (emphasis added).[12]

Because the Fifth Circuit's conclusion contradicts that of the First and Second Circuits, and appears at odds with *Will*, certiorari is proper.

II. Preferring Abstention Over Certification Contradicts This Court's Instructions and Practices in Other Circuits.

This Court has urged the federal courts to utilize state certification procedures in constitutional cases rather than *Pullman* abstention.[13] In *Arizonans for*

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[12] Official-capacity actions against states and/or state officers for money damages are not cognizable under § 1983. *See Will*, 491 U.S. at 71. Thus, the *only* recognized official-capacity action against a state officer under § 1983 is that authorized by *Ex parte Young*. *See Will*, 491 U.S. at 71 n. 10. Of course, state officials can be sued for money damages as individuals. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). There is no question but that these "individual-capacity" actions are governed by Rule 4(e). If an individual-capacity action calls into doubt a state statute, Rule 5.1(a) requires that the state's attorney general be noticed. *See also* 28 U.S.C. § 2403(b) (providing that state must be allowed to intervene). *Compare* Federal Rule of Civil Procedure 4(i)(3) (federal officials sued in their individual capacities are subject to service as individuals under Rule 4(e) and United States must also be served).

[13] *Pullman* abstention is designed to allow federal courts to avoid needlessly resolving constitutional questions. *See* Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974). Thus, it has no application to non-constitutional cases, including diversity actions.

Official English v. Arizona, 520 U.S. 43, 76 (1997), the Court explained that in constitutional litigation, "*Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court." (Citation omitted). "Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* (citations omitted).

Following *Arizonans*, several Circuits have endorsed certification over forcing § 1983 plaintiffs to file additional actions in state court pursuant to *Pullman*.[14] The Ninth Circuit, for example, observed in *Doyle v. City of Medford*, 565 F.3d 536, 543 (9th Cir. 2009), that it prefers certification over abstention "in *Pullman*-type abstention cases 'because the alternative to certification is federal court abstention and the attendant delay until resolution of the

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[14] When parallel proceedings are already pending in state court, federal courts have sometimes used *Pullman* abstention as a more efficient alternative. *See, e.g., Currie v. Group Insurance Commission*, 290 F.3d 1 (1st Cir. 2002) (refusing to certify because state-law issue was pending in state courts); *Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Committee of State Bar of Texas*, 283 F.3d 650, 656-57 (5th Cir. 2002) (refusing to certify because two cases were pending in state courts involving same issue). But this "unusual circumstance" is not present here.

derivative state court . . . action (including trial, the right to a direct appeal, and the right to seek discretionary review after the direct appeal).'" (Citation omitted).

The Second, Tenth and Eleventh Circuits have likewise expressed preferences for certification over abstention in the absence of unusual circumstances. The Second Circuit trumpeted the benefits of certification in *Tunick v. Safir*, 209 F.3d 67, 73 (2d Cir. 2000): "*Arizonans* made quite clear that . . . the device of certification provides all the benefits of *Pullman* abstention . . . [and] therefore . . . that we should consider certifying in more instances than had previously been thought appropriate." *See also Allstate Insurance Co. v. Serio*, 261 F.3d 143, 151 (2d Cir. 2001) (observing in constitutional case that "the Supreme Court indicated that certification is usually preferable to abstention."). The Tenth Circuit in *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008), rejected *Pullman* abstention because "the Supreme Court has expressed a preference for certifying questions to a state's supreme court." The Eleventh Circuit explained its preference for certification in *Pittman v. Cole*, 267 F.3d 1269, 1289 (11th Cir. 2001): "[c]ertification . . . offers substantial benefits over the traditional *Pullman* abstention method. . . . '[It] save[s] time, energy, and resources and helps build a cooperative judicial federalism.'" (Citation omitted).

While not stating clear preferences, several other Circuits have certified state-law questions in

Pullman-type cases. *See, e.g., Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 304 (1st Cir. 2000); *PSINet, Inc. v. Chapman*, 317 F.3d 413, 415 (4th Cir. 2003); *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443, 447 (6th Cir. 2009); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 509-10 (7th Cir. 1998).

The Fifth Circuit alone "has tended to avoid certification in favor of abstention." Molly Thomas-Jensen, *Certification After* Arizonans for Official English v. Arizona: *A Survey of Federal Courts' Practices*, 87 DEN. U. L. REV. 139, 158 (2009). This is not necessarily because the Fifth Circuit objects to certification; after all, it routinely certifies state-law issues in diversity cases (where *Pullman* abstention is unavailable). *See, e.g., Huss v. Gayden,* 508 F.3d 240 (5th Cir. 2007); *National Union Fire Insurance Co. v. Mississippi Ins. Guar. Ass'n,* 507 F.3d 309 (5th Cir. 2007); *Bullock v. AIU Insurance Co.,* 503 F.3d 384 (5th Cir. 2007); *Paz v. Brush Engineered Materials, Inc.,* 445 F.3d 809 (5th Cir. 2006). Rather, it appears that the Fifth Circuit simply prefers *Pullman* abstention and the added obstacles it imposes on constitutional plaintiffs.[15]

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[15] Remarkably, there is *no* reported instance of the Fifth Circuit certifying a state-law question in a *Pullman*-type setting. *See* Thomas-Jensen, *supra*, at 158. *Cf. Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) (rejecting dissent's argument that state-law issue should be certified to Louisiana Supreme Court).

The Fifth Circuit offered no reason for its refusal to use Mississippi's certification procedure. Moreover, because Mississippi's procedure cannot be invoked by the District Court, *see* Miss. R. App. P. 20(a) (stating that only this Court and Courts of Appeals can certify), which has now followed the Fifth Circuit's advice and invoked abstention, Moore is forced to file a full round of needless and cumbersome litigation in Mississippi's courts. This inexplicable approach to constitutional litigation conflicts with the preference for certification expressed by this Court and several Circuits. Certiorari is proper.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60272
consolidated with
No. 09-60424

BRIAN MOORE,

Plaintiff-Appellant,

versus

DELBERT HOSEMANN,
in His Official Capacity as
Mississippi Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Dec. 18, 2009)

Before JONES, Chief Judge, SMITH and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Brian Moore sued the Mississippi Secretary of State (the "Secretary") after being left off that state's 2008 presidential ballot. The district court dismissed the suit as moot and denied Moore's motion for costs

and fees under Federal Rule of Civil Procedure 4(d)(2). We reverse the dismissal and remand because, although the case is not moot, we must abstain. Moore's challenge, like many election disputes, is based on an interpretation of uncertain state law, which should be resolved at the state level before we consider wading into a constitutional thicket. We affirm the denial of costs and fees.

I.

Moore was the 2008 presidential candidate for the Socialist Party USA and was also selected as the Natural Law Party's presidential candidate on the Mississippi ballot. Mississippi law requires all presidential candidates to submit their qualifying papers to the Secretary "not less than sixty days previous to the day of the election." MISS. CODE ANN. § 23-15-785(2). For the 2008 election, the sixty-day deadline fell on Friday, September 5. The statute does not explicitly provide a specific time of day by which a candidate's papers must be filed on the due date, but in accordance with another statute, the Secretary's office closes at 5:00 p.m.

On September 5, shortly after 5:00 p.m., taxi drivers hired by Moore arrived at the Secretary's office to deliver Moore's papers, but the office had closed. The drivers deposited Moore's papers at the

doorstep and left. Because Moore did not meet the filing deadline, his name was left off the ballot.[1]

On September 16, Moore sued Delbert Hosemann in his official capacity as Secretary, seeking a preliminary injunction to certify Moore for the presidential ballot and a preliminary and permanent injunction to prevent the Secretary from enforcing any unauthorized deadlines for ballot qualification of presidential candidates. Moore argued that his constitutional rights were violated when the Secretary imposed the deadline without express legislative authority. The district court denied Moore's request for a preliminary injunction on September 29. We subsequently denied Moore's motion for a stay and preliminary injunction. Moore appealed the denial of an injunction to this court but voluntarily withdrew his appeal after the election had occurred.

Though the opportunity for an injunction had ended, Moore continued to seek a declaratory judgment that the 5:00 p.m. deadline was unconstitutional. The district court granted the Secretary's motion to dismiss the complaint as moot under Federal Rule of Civil Procedure 12(c). In response to Moore's argument that his claim fell under the "capable of repetition, yet evading review" exception to mootness, the court found that there was no

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[1] Moore's vice-presidential running mate, Stewart Alexander, and the Natural Law Party were also parties. Moore alone appeals.

"reasonable expectation" or "demonstrated probability" that Moore or any other Natural Law Party presidential candidates would "again miss what they now know to be the 5:00 p.m. deadline" for filing. The court recognized that this circuit has applied the mootness exception when other individuals in the political process might challenge a law, but held that in the present matter it did "not seem reasonably likely that other prospective presidential/vice-presidential candidates will fail to timely file their qualifying papers before . . . the office closes at 5:00 p.m."

Moore moved for costs and fees pursuant to Federal Rule of Civil Procedure 4(d) on the theory that the Secretary had not satisfied a mandatory requirement to waive service. The district court denied the motion.

On appeal, Moore renews his arguments that his claim falls under the "capable of repetition, yet evading review" exception and that the 5:00 p.m. deadline is unconstitutional. Specifically, Moore contends that the Secretary exceeded his authority in violation of Article II, § 1, cl. 2 of the United States Constitution, which provides that each state shall choose presidential electors "in such manner as the *Legislature* thereof may direct." (Emphasis added.) The upshot of the unauthorized deadline, says Moore, is that Mississippi violated his and voters' First and Fourteenth Amendment rights to participate in the

political process. Moore also appeals the denial of his motion for costs and fees.[2]

II.

We first address whether this case is non-justiciable because the completion of the election renders it moot. We review questions of subject matter jurisdiction, including the justiciability issue of mootness, *de novo*. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006).

Mootness is "the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). "Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Ctr. for Individual Freedom*, 449 F.3d at 661. The Secretary contends that such is the case here, that the occurrence of the November 2008 election means that Moore can no longer seek meaningful redress for the constitutional violations he alleges.

An important exception to the mootness doctrine, however, is "attacks on practices that no longer

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[2] Two appeals were docketed: No. 09-60272, the appeal of the dismissal as moot; and No. 09-60424, the appeal of the dismissal of the motion for costs and fees. The appeals have been consolidated.

directly affect the attacking party, but are 'capable of repetition' while 'evading review.'" *Alvarez v. Smith*, No. 08-351, 2009 U.S. LEXIS 8941, at *10-*11 (U.S. Dec. 8, 2009) (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). To invoke that exception, a party must show that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Wis. Right to Life*, 551 U.S. at 462.

Moore satisfies the first prong: Election controversies are paradigmatic examples of cases that cannot be fully litigated before the particular controversy expires. *See Ctr. for Individual Freedom*, 449 F.3d at 661. We turn then, to the second prong. There is good reason to suppose that Moore might fail that requirement, because he has not averred that he is likely to run for President again.

Following the lead of the Supreme Court, however, in election cases we have applied the second prong somewhat loosely. In *Center for Individual Freedom*, *id.* at 662, we held that "even if it were doubtful" that the plaintiff would again be affected by the allegedly offending election statute, "precedent suggest[ed] that [the] case [was] not moot, because other individuals certainly [would] be affected by the

continuing existence" of the statute.[3] It is true that the Supreme Court's most recent election law decisions, *Davis v. FEC*, 128 S. Ct. 2759 (2008), and *Wisconsin Right to Life* both noted that the plaintiffs had alleged they would again be adversely affected by the complained-of law. But the Court still "has not . . . dismissed an election case as moot where the plaintiff failed to allege that he would be governed by the same flawed law in the next election." *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164 (5th Cir. 2009). Thus, we remain "unwilling to dismiss [a] case as moot when 'the issues properly presented, and their effects . . . will persist as the [restrictions] are applied in future elections.'" *Id.* at 165 (citing *Storer*, 415 U.S. at 737 n.8).

That is the situation here. The Secretary has made it plain that he intends to enforce the 5:00 p.m. deadline in future elections. He adds that the chance is very small that Moore or any other presidential candidate will miss the deadline again. That is beside the point, however. As long as the complained-of deadline is in place, future candidates in Mississippi will be subject to it and will need to conform to its demands. Thus, the effects of the deadline will

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[3] *Cf. Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) ("The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections.").

persist. Given the election law context, Moore's complaint satisfies both prongs of the mootness exception.

III.

Although Moore's constitutional claim survives mootness, we decline to reach the merits. Instead, we remand and urge the district court to consider whether to abstain on the basis of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

In *Pullman*, plaintiffs challenged, on both federal constitutional and state law grounds, the authority of the Texas Railroad Commission to issue a racially discriminatory order. The Supreme Court abstained from deciding the case, because it found that if Texas courts were to strike down the Commission's action on state law grounds, it would be unnecessary to decide the federal constitutional question.

As the Court later explained, the moral of *Pullman* was that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and 'needless friction with state policies.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (quoting *Pullman*, 312 U.S. at 500). "[F]or *Pullman* abstention to be appropriate . . . it must involve (1) a federal constitutional challenge to state action and (2) an

unclear issue of state law that, if resolved, would make it unnecessary for us to rule on the federal constitutional question." *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Committee,* 283 F.3d 650, 653 (5th Cir. 2002). In other words, "[g]enerally, *Pullman* abstention is appropriate only when there is an issue of uncertain state law that is fairly subject to an interpretation [by a state court] which will render unnecessary or substantially modify the federal constitutional question." *Baran v. Port of Beaumont Nav. Dist.,* 57 F.3d 436, 442 (5th Cir. 1995).

Pullman abstention is appropriate here. Moore challenges the Secretary's official actions on federal constitutional grounds. He alleges that by enforcing the 5:00 p.m. deadline without express direction from the legislature, the Secretary devised his own manner of appointing presidential electors, in violation of Article II. As a result, Moore claims, his First and Fourteenth Amendment rights to political participation were violated.

Moreover, the existence of a federal constitutional question is entirely contingent on an unresolved interpretation of Mississippi law. The Secretary argues that by closing his office at 5:00 p.m. he was not creating election rules, but merely following the existing laws enacted by the legislature. He points to provisions of the Mississippi Code that provide for regular office hours. All state offices, for example, are required to operate between 8:00 a.m. and 5:00 p.m., and the Secretary is required to operate eight hours each weekday. *See* MISS. CODE

ANN. §§ 25-1-98, 7-3-3. In the Secretary's view, then, he did not add to, or even interpret, the sixty-day deadline in § 23-15-785(2), but rather complied with the strict letter of three interrelated state statutes.

Moore contends that, to the contrary, because § 23-15-785(2) does not contain its own mention of a closing time, the Secretary was required to keep his office open until midnight on September 5. Moore points out that a number of other Mississippi election statutes do mention 5:00 p.m. filing deadlines and that presidential absentee ballots have a later receipt deadline than do ballots for other offices.[4]

The question of state law here is at least – and perhaps even more than – "fairly subject" to the Secretary's understanding. We abstain from deciding this question of state law prematurely, however, because an authoritative answer from the Mississippi courts in the Secretary's favor would also dispose of any federal constitutional question. We therefore remand the constitutional claim to the district court and urge it, likewise, to consider whether to abstain.

IV.

Moore claims he is entitled to costs and fees under rule 4(d), which requires certain defendants, upon request, to waive service, and which allows

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[4] *See* MISS. CODE ANN. §§ 23-15-299(3), 23-15-309(1), 23-15-359(3), 23-15-361(1), 23-15-721(3), 23-15-807(e), 23-15-637.

plaintiffs to cover expenses related to service if the defendant does not waive. The district court found that Moore's motion for costs and fees was without merit. We agree.

Rule 4's mandatory waiver provisions apply only to "[a]n individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h)." FED. R. CIV. P. 4(d)(1). State governments, municipal corporations, and "other state-created governmental organization[s]," along with the federal government and foreign sovereigns, are not subject to mandatory waiver. As the 1993 Advisory Committee Note to rule 4(d) explains:

> The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail.

Moore argues that the Secretary, even when sued in his official capacity, should be considered an "individual" for purposes of rule 4's mandatory waiver provision. He is incorrect. The Advisory Committee Note expressly states that the rationale for shielding

the United States from the mandatory waiver-of-service provisions also applies to its "agencies, corporations, and officers" and similarly "to other governments and entities subject to service under subdivision (j)." Although neither the rule nor the Advisory Committee note attempts to define which state "entities" are similarly shielded from the mandatory waiver provisions, the most reasonable reading of rule 4 affords state officers facing official capacity suits the same consideration given to federal officers in the same position.

Nor is Moore's reliance on First Circuit caselaw persuasive. In two instances, that circuit held that state officials sued in their individual capacities should receive process as individuals under rule 4(e) (and its predecessor) rather than as state government entities under rule 4(j). *See Echevarria-Gonzalez v. Gonzalez-Chapel,* 849 F.2d 24 (1st Cir. 1988); *Caisse v. DuBois,* 346 F.3d 213 (1st Cir. 2003). Neither *Echevarria* nor *Caisse*, however, addressed whether a state official was subject to mandatory waiver obligations under rule 4(d); instead, both cases concerned whether plaintiffs had made adequate service on state official defendants. For the reason stated above, we disagree with the First Circuit's reading of rule 4, at least insofar as the First Circuit's reasoning

subjects state officers to the mandatory waiver provisions of the rule.[5]

A number of other courts have held that state officers sued in their official capacities are subject to service under rule 4(j) or its predecessor.[6] We join them in saying that a state official sued in his official capacity is not subject to the mandatory waiver-of-service provisions of rule 4(d). Thus, we affirm the dismissal of Moore's motion for costs and fees.

For the reasons explained, the judgment is AFFIRMED in part and REVERSED and REMANDED in part.

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[5] The parties placed great emphasis on the holding in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) that, for the purposes of a 42 U.S.C. § 1983 action for money damages, "a suit against a state official in his or her official capacity is a suit against the official's office," and also on the *dictum* that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983." *Will*, 491 U.S. at 71, 71 n.10. This emphasis on *Will* is misplaced. The question here is not about the definition of a "person" under § 1983, but rather the definition of an "individual" under rule 4.

[6] *See, e.g., Libertarian Party v. Dardenne*, 2009 WL 790149, at *5 (M.D. La. Mar. 24, 2009); *Mack v. Fox*, 2008 WL 4832995, at *3 (M.D.N.C. Nov. 4, 2008); *Chapman v. N.Y. State Div. for Youth*, 227 F.R.D. 175, 179-80 (N.D.N.Y. 2005); *Randall v. Crist*, 2005 WL 5979678, at *2 (N.D. Fla. Nov. 1, 2005); *Gaynor v. Martin*, 77 F. Supp. 2d 272, 282 (D. Conn. 1999); *Banerjee v. Roberts*, 641 F. Supp. 1093 (D. Conn. 1986).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BRIAN MOORE,
STEWART ALEXANDER
AND THE NATURAL LAW
PARTY OF MISSISSIPPI — PLAINTIFFS

VS. — CIVIL ACTION NO. 3:08CV573TSL-JCS

DELBERT HOSEMANN,
IN HIS OFFICIAL CAPACITY
AS MISSISSIPPI SECRETARY
OF STATE — DEFENDANT

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant Delbert Hoseman, in his official capacity as Mississippi Secretary of State, to dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the basis that the case is moot and that plaintiffs therefore lack standing to pursue their claims herein. Plaintiffs Brian Moore, Stewart Alexander and the Natural Law Party have responded in opposition to the motion and the court, having considered the memoranda of authorities submitted by the parties, concludes that defendant's motion is well taken and should be granted.

In order to be included on the ballot as presidential and vice-presidential candidates, Mississippi law requires that candidates file their qualifying documents with the office of the Secretary of State

not less than sixty days prior to the day of the general election. Miss. Code Ann. § 23-15-785(2). Thus, for the November 2008 general election, September 5, 2008 was the last day on which candidates could file their documentation with the Secretary of State. Plaintiffs attempted to do this, but when they arrived at the Secretary of State's office shortly after 5:00 p.m., the office was closed and the Secretary of State refused to accept their qualifying papers.

Plaintiffs filed this action on September 16, 2008, along with an accompanying motion for temporary restraining order and preliminary injunction, seeking to enjoin defendant to include them on the ballot, contending that defendant's refusal to accept their qualifying papers violated their rights under the United States Constitution. Specifically, plaintiffs charged that by closing his office at 5:00 p.m. when the statute establishing the qualifying deadline specified only a date by which the papers were to be filed but not a time by which they had to be filed, defendant unconstitutionally usurped the role of the Legislature, in violation of Article II, § 1, cl. 2, under which only the state "Legislature" can prescribe rules for presidential elections. They further charged that defendant's actions deprived them of a reasonable opportunity to qualify for the ballot and thereby violated their rights under the First and Fourteenth Amendments.

Following a hearing, the court ruled from the bench, and later entered a written opinion and order denying plaintiffs' request for an injunction upon

finding that plaintiffs had failed to demonstrate a likelihood of success on the merits of their claims. The court opined as follows:

First, that the Secretary of State's decision to close his office at the traditional hour of 5:00 p.m. when such a deadline is not explicitly set forth in Section 23-15-785(2), was reasonable and was not inconsistent with the state's election statutes and hence was not a usurpation of the Mississippi Legislature's authority under Art. II, § 1, cl. 2 to direct the manner of appointment for presidential electors;

Second, that defendant's decision to close at 5:00 p.m. did not violate plaintiffs' due process rights because even if the decision was contrary to state law (which this court did not consider that it was), consistent with state law, it was not one of the "rare, but serious, violations of state election laws that undermine the basic fairness and integrity of the democratic system" warranting relief under the Fourteenth Amendment;

Third, that plaintiffs' argument that the Secretary of State was estopped from refusing the qualifying documents because the Secretary's office allegedly stated to Mr. Moore that a late filing would be accepted did not support application of the doctrine of constitutional estoppel; and

Lastly, that once the court had disposed of plaintiffs' constitutional claims, it would not likely retain jurisdiction over plaintiffs' state law-related

claims, particularly since the Eleventh Amendment does not allow for any relief, prospective or otherwise, to be granted in federal court solely on the basis of state law violations.

Plaintiffs appealed this court's order, but after the Fifth Circuit denied their motion for a stay pending appeal and preliminary injunction, plaintiffs voluntarily dismissed their appeal. When plaintiffs thereafter served defendant with process, indicating their desire to pursue their claims herein notwithstanding that the election had concluded, defendant filed his motion to dismiss, contending therein that since the 2008 election has already occurred, plaintiffs lack standing and their claims have become moot.

> Article III restricts federal courts to the resolution of cases and controversies. That restriction requires that the party invoking federal jurisdiction have standing – the "personal interest that must exist at the commencement of the litigation." But it is not enough that the requisite interest exist at the outset. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'"
>
> . . .
>
> [T]he requirement that a claimant have "standing is an essential and unchanging part of the case-or-controversy requirement

> of Article III." To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.

Davis v. Federal Election Com'n, 128 S. Ct. 2759, 2768 (2008) (citations omitted).

> "Mootness" is 'the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).' If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it presents.
>
> . . .
>
> As a general rule, "any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." A case should not be declared moot "[a]s long as the parties maintain a 'concrete interest in the outcome' and effective relief is available to remedy the effect of the violation. . . ." But a case will become moot where "there are no longer adverse parties with sufficient legal interests to maintain the litigation" or "when the parties lack a legally cognizable interest in the outcome" of the litigation. As the Supreme Court has noted, "it is not enough that a dispute was very much alive when the suit was filed; . . . [t]he parties must continue to

> have a personal stake in the outcome of the lawsuit."

Environmental Conservation Organization v. City of Dallas, 529 F.3d 519, 524-525 (5th Cir. 2008) (citations omitted).

In the case at bar, since the 2008 election is over, plaintiffs are no longer involved in any case or controversy relating to the 2008 election ballot. Accordingly, their claim for injunctive relief is obviously moot since plaintiffs sought only to preliminarily enjoin defendant to certify them for the 2008 ballot and to preliminarily and permanently enjoin defendant "from enforcing *in 2008* any deadline for the qualification of recognized political parties' presidential candidates." (Emphasis added). In sum, the fact that the 2008 elections have been concluded renders moot plaintiffs' claim for injunctive relief.

Plaintiffs have also sought a declaratory judgment declaring defendant's effective imposition of a 5:00 p.m. deadline on the qualifying date established by the state legislature unconstitutional. In the court's opinion, however, there is no longer any controversy between parties having adverse interests of sufficient immediacy and reality to warrant the requested relief.

When considering the potential mootness of a claim for declaratory relief, "[t]he question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient

immediacy and reality to warrant the issuance of a declaratory judgment.'" *Super Tire Eng'g Co. v. McCorkle,* 416 U.S. 115, 122, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)). The court should also consider the related question whether the issues are "capable of repetition, yet evading review," which is one of the recognized exceptions to the mootness doctrine. This exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Federal Election Com'n v. Wisconsin Right To Life, Inc.,* 127 S. Ct. 2652, 2662 (2007). "The second prong of the 'capable of repetition' exception requires a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Id.* (citation omitted). The Supreme Court has found that "the same controversy sufficiently likely to recur when a party has a reasonable expectation that it 'will again be subjected to the alleged illegality,'. . . ." *Id.* at 2663 (2007). *See Nautilus Ins. Co. v. Nevco Waterproofing,* 202 Fed. Appx. 667, 668-669, 2006 WL 2920596, 1 (5th Cir. 2006) (finding "capable of repetition yet evading review" exception inapplicable because "the possibility that Concierge (defendant) might sue Nevco (plaintiff) in the future is not of 'sufficient immediacy and reality' to warrant a declaratory judgment"). In the court's opinion, there is no

"reasonable expectation" or "demonstrated probability" that these plaintiffs, or any prospective Natural Law Party candidates for president and vice-president, will again miss what they now know to be the 5:00 p.m. deadline for filing their qualifying papers.[1] *Cf. Presnick v. Bysiewicz*, 297 F. Supp. 2d 431, 435 (D. Conn. 2003) (denying exception where "Plaintiff has not adequately demonstrated that he will again run for office, that he will be the only candidate running against an otherwise unopposed incumbent, and that plaintiff will fail to fulfill the petition requirements pursuant to § 9-453d").

The court acknowledges plaintiffs' argument that the Fifth Circuit has held in the context of election law challenges that in considering whether the "reasonable expectation that the same complaining party would be subject to the same action again," the court "does not always focus on whether a particular

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[1] Plaintiffs argue that the proper inquiry is not whether it can reasonably be expected that they (or anyone else) might miss defendant's 5:00 p.m. deadline, but rather is whether there exists a reasonable expectation that defendant "might again attempt to regulate presidential elections." The court rejects plaintiffs' position for plaintiffs themselves have not contended that defendant has attempted to regulate presidential elections in any way other than by closing his office at 5:00 p.m. on the date of the qualifying deadline established by the legislature. Even if that were the inquiry – which it is not – plaintiffs have offered no basis for any reasonable expectation that the Secretary of State would in the future undertake to usurp the legislative function with respect to the conduct of presidential elections.

plaintiff is likely to incur the same injury," and that it is instead enough that "other individuals" in the political process might challenge the law in the future. *See Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006) (finding that "even if it were doubtful that the [plaintiff] would again attempt to engage in election related speech in Louisiana, precedent suggests that this case is not moot, because other individuals certainly will be affected by the continuing existence of the [challenged laws]"). However, even if the proper focus were not necessarily limited to whether these particular plaintiffs will be subject to the same action again,[2] in the court's opinion, it does not seem reasonably likely that other prospective presidential/vice-presidential candidates will fail to timely file their qualifying papers before the Secretary of State's office closes at 5:00 p.m. on the date of the qualifying deadline.[3]

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[2] In two cases since *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006), was decided, the Supreme Court has reiterated that the party seeking to establish the "capable of repetition yet evading review" exception must establish that "there is a reasonable expectation that the same complaining party will be subject to the same action again." *See Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652, 2663 (2007), and *Davis v. Federal Election Com'n*, 128 S. Ct. 2759, 2770 (2008).

[3] In this vein, the court notes that plaintiffs' problem arose because they missed the deadline, not because they were unaware of the deadline. Plaintiffs knew the office closed at 5:00 p.m. and simply failed to get there in time.

For these reasons, it is ordered that defendant's motion to dismiss is granted.

SO ORDERED this 10th day of March, 2009

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BRIAN MOORE,
STEWART ALEXANDER
AND THE NATURAL LAW
PARTY OF MISSISSIPPI — PLAINTIFFS

VS. — CIVIL ACTION NO. 3:08CV573TSL-JCS

DELBERT HOSEMANN,
IN HIS OFFICIAL CAPACITY
AS MISSISSIPPI SECRETARY
OF STATE — DEFENDANT

ORDER

This cause is before the court on the motion of plaintiffs Brian Moore, Stewart Alexander and the Natural Law Party for costs and attorney's fees pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure. Defendant Delbert Hoseman, in his official capacity as Mississippi Secretary of State, has responded in opposition to the motion, and the court, for the reasons assigned in defendant's response, concludes that plaintiffs' motion is patently without merit and should be denied.

Accordingly it is ordered that plaintiffs' motion for costs and attorney's fees is denied.

SO ORDERED this 14th day of May, 2009.

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60272

Consolidated With 09-060424

BRIAN MOORE,

Plaintiff-Appellant [3:08cv573]

versus

DELBERT HOSEMANN, In his official capacity as Mississippi Secretary of State,

Defendant-Appellee

Appeals from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING

(Filed Jan. 18, 2010)

Before JONES, Chief Judge, SMITH and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Jay Smith
United States Circuit Judge

Supreme Court, U.S.
FILED
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No. 09-982

In the Supreme Court of the United States

BRIAN MOORE,

Petitioner,

v.

DELBERT HOSEMANN,
MISSISSIPPI SECRETARY OF STATE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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Questions Presented

Whether the court of appeals correctly held that the waiver of service provision in Federal Rule of Civil Procedure 4(d) does not apply to a state constitutional officer sued exclusively in his official capacity.

Whether the court of appeals correctly abstained pursuant to *Railroad Commission v. Pullman Co.* in light of the unique legal and factual context of this case.

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Constitutional, Statutory, and Other Provisions Involved

In addition to the items cited by the petitioner, the respondent restates the operative state statute to reflect a recent amendment that moots the legal issue giving rise to the suit. The respondent also sets forth additional state statutes and further provisions of Federal Rule of Civil Procedure 4(d)(1) that are relevant but were not cited by the petitioner.

Miss. Code § 23-15-785(2) (as amended by S. B. 3058, Reg. Sess. (Miss. 2010), approved by the Governor on March 17, 2010):[1]

> The certificate of nomination by a political party convention must be signed by the presiding officer and secretary of the convention and by the chairman of the state executive committee of the political party making the nomination. Any nominating petition, to be valid, must contain the signatures as well as the addresses of the petitioners. The certificates and petitions must be filed with the State Board of Election Commissioners by filing them in the Office of the Secretary of State by 5:00 p.m. not less than sixty (60) days previous to the day of the election.

Miss. Code § 7-3-3:

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[1] Senate Bill 3058 is reprinted in the Brief in Opposition's Appendix A (Opp. App.) 1b-4b.

> The secretary of state shall keep his office at the seat of the government, shall keep the same open Monday through Friday of each week for eight hours each day, and shall carefully preserve the official books, library, papers, records, and furniture belonging to his office.

Miss. Code § 25-1-98:

> In addition to any other times required by statute, all state offices shall be open and staffed for the normal conduct of business from 8:00 a.m. until 5:00 p.m., Monday through Friday, except on legal holidays as set forth in Section 3-3-7.

Federal Rule of Civil Procedure 4(d)(1):

> (1) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:
>
> (A) be in writing and be addressed:
>
> (i) to the individual defendant; or
>
> (ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent--or at least 60 days if sent to the defendant outside any judicial district of the United States--to return the waiver; and

(G) be sent by first-class mail or other reliable means.

Statement of the Case

Mississippi Code Section 23-15-785(2) required petitioner's presidential candidate qualifying papers to be filed with the office of the Secretary of State not less than sixty days prior to the November 2008 general election. Miss. Code Ann. § 23-15-785(2) (Rev. 2007). The version of Section 23-15-785(2) in effect in 2008 did not address the hour at which the Secretary's office should close on the sixtieth day before the general election. The underlying dispute in this case involves the Secretary's closure of his office at the traditional hour of 5:00 p.m. on the last day that qualification petitions could be timely filed with his office. Despite

petitioner's prior knowledge of the business hours of the Secretary's office, petitioner admittedly arrived after 5:00 p.m. on that last day and was unable to file his petition because the office was closed.

In this litigation, petitioner asserts that because Section 23-15-785(2) did not specify that the Secretary's office must close at 5:00 p.m. the office was required to deviate from its normal business hours and remain open until midnight in order to receive petitioner's filing. The Secretary notes that other provisions of the Mississippi code provide that the Secretary's office is open eight hours per work day, from 8:00 a.m. until 5:00 p.m. In an attempt to transform a disagreement with the Secretary's interpretation of state law into a federal constitutional claim, petitioner asserts that the Secretary's decision to close his office at 5:00 p.m. when such a time was not explicitly set forth in Section 23-15-785(2) was a usurpation of the Mississippi legislature's authority to direct the manner of appointment of presidential electors under Art. II, § 1, cl. 2 of the United States Constitution. Pet. 6 (citing *Bush v. Gore*, 531 U.S. 98 (2000)).

Important to this Court, Section 23-15-782(2) was amended during the 2010 legislative session to remove any doubt that presidential qualifying petitions must be filed by 5:00 p.m. on the sixtieth day before the general election. Opp. App. 2b. Because the legislature has now expressly adopted a 5:00 p.m. deadline, petitioner's allegation that the Secretary is acting contrary to the legislature's direction is definitively answered. This legislative action moots the petitioner's only claim, a claim for prospective relief requiring the Secretary's office to remain open

until midnight on the last day to file future presidential candidate petitions.

(1) The 2008 Version of Section 23-15-785(2).

The version of Mississippi code section 23-15-785(2) in effect in 2008 required presidential nominating petitions from political parties to be submitted to the "State Board of Election Commissioners by filing the same in the office of the Secretary of State not less than sixty (60) days previous to the day of the election." *See* Miss. Code Ann. § 23-15-785(2) (Rev. 2007). Pursuant to the sixty-day deadline, petitioner was required to file his petition by Friday, September 5, 2008. Pet. 5. Section 23-15-785(2) did not direct the Secretary to keep his office open beyond its traditional hours of operation. Indeed, other statutory provisions expressed the legislature's intent that the Secretary's office should be open from 8:00 a.m. to 5:00 p.m. on regular business days. *See* Miss. Code Ann. § 7-3-3 (Rev. 2002) ("The secretary of state shall keep his office at the seat of the government, shall keep the same open Monday through Friday of each week for eight hours each day, ..."); Miss. Code Ann. § 25-1-98 (Rev. 2006) ("In addition to any other times required by statute, all state offices shall be open and staffed for the normal conduct of business from 8:00 a.m. until 5:00 p.m., Monday through Friday,. . . .") On September 5, the Secretary closed his office at the traditional hour of 5:00 p.m. as required by state law. Prior to September 5, petitioner was aware that the office would close at 5:00 p.m. and that his documents must be filed before that time. Opp. App. 6b.

(2) Petitioner's 2008 Attempt to File and Subsequent Litigation

After missing the known 5:00 p.m. deadline, petitioner filed this action pursuant to 42 U.S.C. § 1983 alleging that the Secretary's closure of his office at 5:00 p.m. when Section 23-15-785(2) made no mention of 5:00 p.m. was a "significant departure" from the Mississippi legislature's designated process for the selection of presidential electors so as to usurp the legislature's authority under Art. II, § 1, cl. 2 of the United States Constitution.[2] Pet 6. The complaint sought prospective relief placing petitioner on the November 2008 presidential ballot.

At the preliminary injunction hearing, petitioner testified that he was aware prior to September 5 that the Secretary's office would close at 5:00 p.m. and that his petition must be filed before 5:00 p.m. Opp. App. 6b. The district court denied the preliminary injunction motion, finding in part that the Secretary's "interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes." *Id.* at 7b. The Fifth Circuit declined petitioner's request for an emergency stay, and petitioner subsequently dismissed his interlocutory appeal and request for emergency relief pending before the Fifth Circuit.

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[2] Petitioner conceded to the district court that a 5:00 p.m. deadline, if consistent with state law, is not itself unconstitutional. Opp. App. 8b.

On March 10, 2009, the district court granted the Secretary's motion to dismiss the complaint as moot in light of the concluded 2008 election. On April 9, 2009, petitioner filed a motion for expenses under Federal Rule of Civil Procedure 4(d)(2). The Secretary opposed the motion because Rule 4(d) does not apply to a suit brought against a state constitutional officer exclusively in his official capacity and because petitioner failed to comply with the mandatory procedural requirements of Rule 4(d). The district court denied the motion for expenses "for the reasons assigned in defendant's response." Pet. App. 24.

Petitioner appealed the dismissal and the order denying expenses. The Fifth Circuit affirmed the denial of petitioner's motion for expenses, finding that Rule 4(d) does not apply to state officers sued only in their official capacity. Pet. App. 10-13. The Fifth Circuit reversed the dismissal on the grounds of mootness, abstained from considering the merits under *Pullman*, and remanded the case for the district court to "consider whether to abstain" under *Pullman*. Pet. App. 1-10. On remand, the district court abstained under *Pullman*.

To the best of respondent's knowledge, petitioner has not filed a "new round of litigation in state court." *See* Pet. 10.

(3) The 2010 Amendment to Mississippi Code Section 23-15-785(2).

During the 2010 session, the Mississippi legislature amended Section 23-15-785(2) to resolve any misconception about the deadline by which presidential qualifying petitions must be filed. The

legislature added language specifying that the filings must be made "*by 5:00 p.m.* not less than sixty (60) days previous to the day of the election." *See* Opp. App. 2b (added language in italics). Mississippi is a covered jurisdiction under Section 5 of the Voting Rights Act, and the legislation requires the Attorney General to submit the clarification to the Department of Justice for preclearance. Opp. App. 3b. The amendment was transmitted to the Department on April 13, 2010. The preclearance process is generally completed within sixty days of the Department's receipt of the submission. *See* 28 C.F.R. § 51.9(a). The respondent fully expects the amendment to be precleared as it is uncontroversial; denies no one the right to vote; and has no discriminatory "purpose" nor "effect" with respect to race, color, or membership in a language minority group. *See Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 328 (2000); 42 U.S.C. § 1973c; 28 C.F.R. § 51.52.

A full thirty days after the Governor signed into law the amendment to Section 23-15-785(2), and on the last business day before respondent's opposition was due, petitioner thought it wise to inform this Court of the amendment by filing a supplemental brief. Petitioner's supplement casts the actions of Mississippi's legislative and executive branches as a dastardly attempt to "cause mootness" by enacting the amendment "on the day this Court called for a response." Supp. Pet. 3. In fact, the legislation was introduced in January 2010, after the Fifth Circuit abstained and before petitioner filed with this Court.[3]

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[3] *See* http://billstatus.ls.state.ms.us/documents/2010/pdf/SB/3000-3099/SB3058IN.pdf.

The bill was approved by the Governor on March 17, 2010. This Court did not call for a response until March 19. Far from an unseemly act, the legislature addressed the exact infirmity alleged to exist by petitioner. Petitioner's complaint sought to prohibit the Secretary from closing at 5:00 p.m. on the sixtieth day before presidential general elections solely because petitioner believed a 5:00 p.m. deadline had not been authorized by the Mississippi legislature. Indeed, Petitioner conceded to the district court that a 5:00 p.m. deadline, if consistent with state law, is not itself unconstitutional. Opp. App. 8b. The legislature has now removed any doubt regarding its direction that qualifying petitions must be filed by 5:00 p.m. It is ironic that the legislature's act of addressing petitioner's alleged constitutional infirmity is considered by petitioner to be the legislature's wrongful spoiling his argument.

While the supplemental brief's legal arguments regarding mootness are addressed below, it is important to note that petitioner has offered no reason whatsoever why the Department would not preclear this uncontroversial amendment. *See* Supp. Pet. 2. Preclearance is fully expected.

Reasons to Deny the Petition

I. Review of the Fifth Circuit's Holding Regarding Waiver Under Rule 4(d) is Unwarranted.

A. There is no Circuit Split as the Fifth Circuit is the Only Circuit Court to Address the Application of Rule 4(d)'s Waiver Provision to State Officers Sued in Their Official Capacities.

Put simply, there is no direct conflict among the circuits regarding the precise question addressed by the Fifth Circuit. The Fifth Circuit is the only circuit court to address the application of Rule 4(d)'s waiver of service of process provision to state officers sued solely in their official capacity. Petitioner, recognizing that no other circuit has addressed this issue, attempts to manufacture a conflict with the First and Second Circuits by arguing that opinions of those circuits regarding other provisions of Rule 4, decided in wholly different contexts, conflict in principle with the Fifth Circuit's conclusion. The alleged conflict is overstated.

Although petitioner suggests otherwise, this case does not involve a challenge to the sufficiency of service of process under Rule 4(e) or 4(j) nor does it involve an application of *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Instead, the Fifth Circuit reviewed a narrow question regarding Rule 4(d)'s waiver provision. Noting the Advisory Committee's explanation of Rule 4(d)'s policy and limited application, the Fifth Circuit concluded that a state officer sued only in his official capacity is not subject to the waiver provision in Rule 4(d). Pet.

App.10-13. The 1993 Advisory Committee noted that the United States and other governmental entities are not expected to waive service for the reason that their "mail receiving facilities are inadequate to assure that notice is actually received by the correct person." Fed. R. Civ. P. 4 advisory committee note. Directly on point, the Advisory Committee further explained that as a matter of public policy "governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail." *Id.* When, as in this case, the Secretary of State is named exclusively in his official capacity in a suit taking issue with his routine interpretation and execution of state law, it would be the "governmental entity," i.e., the State and its taxpayers, that would bear the costs of service. The Fifth Circuit concluded that "the most reasonable reading" of Rule 4(d) excludes its application to purely official capacity claims.[4] Pet. App. 12. While the Fifth Circuit is the only circuit court to address Rule 4(d)'s application to official capacity claims, the holding is consistent with all but one of the known district court opinions considering the precise question. *See Chapman v. N.Y.State Div. for Youth*, 227 F.R.D. 175, 179-180 (N.D.N.Y. 2005) (finding Rule 4(d) inapplicable to official capacity claims); *accord Randall v. Crist*, No. 5:03-cv-00220, 2005 WL 5979678, at *2 (N.D. Fla. Nov. 1, 2005); *Cupe v. Lantz*, 470 F. Supp. 2d 136, 138 (D. Conn. 2007); *Libertarian Party v. Dardenne*, No. 08-582, 2009 WL 790149, at * 5 (M.D.La. Mar. 24, 2009), *aff'd*, 595 F.3d 215 (5th Cir.2010); *but see Marcello v.*

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[4] The Fifth Circuit also noted that *Will*'s definition of a "person" for purposes of 42 U.S.C. § 1983 was unrelated to the definition of an "individual" for purposes of Rule 4(d). Pet. App. 13 n.5.

Maine, 238 F.R.D. 113, 115 (D. Me. 2006) (finding Rule 4(d) applicable to official capacity claims).

Petitioner errs in suggesting that the Second Circuit's unpublished decision in *Stoianoff v. Comm. of Motor Vehicles* is in conflict with the Fifth Circuit's holding that Rule 4(d) does not apply to official capacity suits. *Stoianoff*, No. 99-7363, 2000 WL 287720 (2nd Cir. Mar. 16, 2000); Pet. 12. *Stoianoff* addressed sufficiency of service under Rule 4(j) and did not address the application of Rule 4(d). After finding that the *pro se* litigant had failed to properly serve an official capacity complaint pursuant to Rule 4(j), the *Stoianoff* decision noted in dicta that "it may be" that service of the official capacity complaint could be accomplished through Rule 4(e) but that the issue need not be decided because service through the means authorized by state law would satisfy both Rule 4(e) and Rule 4(j)(2). *Id.* at * 1, 2. Further, *Stoianoff* is an unpublished opinion not relied upon as authority within the Second Circuit. *See Sullivan v. Gagnier*, 225 F.3d 161, 165 n.4 (2nd Cir. 2000) (noting unpublished opinions are not precedent). Most importantly, that the Second Circuit did not decide the application of Rule 4(d)'s waiver provision to official capacity suits is evidenced by the fact that subsequent district court decisions within the Second Circuit do not cite *Stoianoff*. In fact, those subsequent district court opinions agree with the Fifth Circuit's conclusion that Rule 4(d) does not apply to suits against state officers in their official capacity. *See Chapman*, 227 F.R.D. at 179-180; *Cupe*, 470 F. Supp. 2d at 138. The

Second Circuit's holding in *Stoianoff* is not at odds with the Fifth Circuit's application of Rule 4(d).[5]

With respect to the First Circuit's decision in *Echevarria-Gonzalez v. Gonzalez-Chapel*, the Fifth Circuit's opinion accurately noted that *Echevarria* addressed only "whether plaintiffs had made adequate service on state official defendants" and not "whether a state official was subject to mandatory waiver obligations under rule 4(d)." Pet. App. 12 (citing *Echevarria*, 849 F.2d 24 (1st Cir. 1988)). While *Echevarria*'s holding is clearly limited to sufficiency of service,[6] the decision is further removed from the question of waiver because it predates the current, 1993 version of Rule 4(d) and the Advisory Committee's explanation that Rule 4(d) was not intended to require governmental entities to bear the

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[5] Petitioner's brief to the Fifth Circuit claimed that *Stoinanoff* evidenced that the Second Circuit "seems to be leaning" in the direction of applying Rule 4(e) to official capacity claims. Brief of Appellant before the Fifth Circuit at 49 n. 23. Before this Court, petitioner has escalated his rhetorical claim.

[6] Although removed from the question addressed by the Fifth Circuit, petitioner identifies no other circuit court that has adopted *Echevarria*'s holding that a state officer sued exclusively in his official capacity is treated as an "individual" under Rule 4(e) rather than as a governmental entity under Rule 4(j). Rule 17(d)'s direction that an officer sued in his official capacity may be "designed by official title rather than by name," as well as Rule 25(d)'s automatic substitution of successors of public officers sued in their official capacity, both undermine *Echevarria*'s conclusion that officers sued in their official capacities are nothing more than traditional "individual" defendants under Rule 4(e).

costs of service.[7] In this matter, it was the petitioner who argued that *Echevarria*'s reasoning should be extended beyond the First Circuit's holding and applied to a different section of Rule 4, a section the current version of which was not in existence at the time of *Echevarria*. The Fifth Circuit's opinion was explicitly limited to rejecting petitioner's expansive application of *Echevarria*. Any disagreement was only "insofar" as *Echevarria*'s reasoning was argued by petitioner to govern a different and revised section of Rule 4.[8] Pet. App. 12.

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[7] The 1993 amendments to Rule 4 expanded the waiver provision to about twice the length of its former version and provided "a clarity and level of precision that was missing from its predecessors." 4A Charles Alan Wright et al., Federal Practice & Procedure § 1092.1 (3d ed 2010). Importantly, it was not until the 1993 notes that the Advisory Committee explained that as a matter of public policy "governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail." Fed. R. Civ. P. 4 advisory committee note. Also in the 1993, the Advisory Committee further explained that the United States and other governmental entities are not expected to waive service for the reason that their "mail receiving facilities are inadequate to assure that notice is actually received by the correct person." *Id.*

[8] The petition also cites the First Circuit's opinion in *Caisse v. Dubois*, 346 F.3d 213 (1st Cir. 2003), as evidence of the alleged conflict. *Caisse* involved a dispute over the sufficiency of service in which the First Circuit merely restated that, according to *Echevarria*, service of process for public employees is governed by Rule 4(e). *Id.* at 216. *Cassie* did not involve an application of Rule 4(d)'s waiver provision nor did the opinion examine *Echevarria* in light of the 1993 amendments and accompanying Advisory Committee notes.

To be sure, the opinion below suggests a limited disagreement with *Echevarria*, a reference on which the petition relies heavily. But petitioner overstates this alleged conflict. At best, petitioner can maintain that given the conclusion reached by *Echevarria* regarding sufficiency of service, the First Circuit *may* disagree with the Fifth Circuit if and when it considers Rule 4(d)'s application to official capacity claims. But this is speculation, not a pronounced and existing intolerable conflict between circuit courts. Indeed, it may well be that since *Echevarria* was decided over twenty years ago, and given the changes to Rule 4(d), the 1993 committee notes, and the intervening opinions of the Fifth Circuit and many district courts, the First Circuit may, when it considers the precise question, agree that *Echevarria*'s statements regarding sufficiency of service were not intended to subject state officers, and thereby the state, to the waiver provisions of Rule 4(d). Petitioner's premonition as to how the First Circuit would address the question does not present an actual "direct conflict" suitable for review. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (denying certiorari and finding speculation regarding how a circuit court would resolve a question is an insufficient basis on which to claim a conflict).[9]

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[9] The remaining cases cited by petitioner in support of the alleged conflict among circuits are not persuasive. Pet. 13, n.9. None of the cases were decided by a court of appeals. *Cf.* Sup. Ct. R. 10(a). Further, *Whatley* and *Mosby* did not address whether Rule 4(d) applies in official capacity only claims because those defendants were either named in both their official and individual capacities or only in their individual capacity. *Whatley v. District of Columbia*, 188 F.R.D. 1, 2 (D.D.C. 1999); *Mosby v. Douglas County Corr. Ctr.*, 192 F.R.D. 282 (D. Neb. 2000). The Fifth Circuit's decision did not address, and there appears to be no circuit split

In sum, the opinion below and *Echevarria* addressed different questions governed by different sections of Rule 4. *Echevarria*'s relevance is further undermined by the intervening Advisory Committee notes explaining the public policy against applying Rule 4(d) in instances in which governmental entities and their taxpayers will bear the costs. Because the Fifth Circuit is the only circuit to address the matter, there is not a genuine conflict among the circuit courts regarding the application of Rule 4(d) to official capacity claims. This Court should permit circuit courts other than the Fifth Circuit to address the precise question before considering review.

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regarding, whether a government employee sued at least in part in their individual capacity is subject to the waiver requirements of Rule 4(d). The petition has identified a single court, a district court, that has found Rule 4(d)'s waiver provision to be applicable to official capacity suits. *Marcello v. Maine*, 238 F.R.D. 113 (D. Me. 2006). Even if this district court opinion was a sufficient basis for review under Supreme Court Rule 10(a), it is an outlier opinion that appears not to have been relied upon by other courts and is contrary to the opinion below as well as district court opinions in the Second, Fifth, and Eleventh Circuits finding that Rule 4(d) does not apply to official capacity suits. *See Chapman*, 227 F.R.D. at 179-180 (N.D.N.Y. 2005); *Randall*, 2005 WL 5979678 *2 (N.D. Fla. Nov. 1, 2005); *Cape*, 470 F. Supp. 2d at 138 (D. Conn. 2007); *Libertarian Party*, 2009 WL 790149 * 5 (M.D. La. Mar. 24, 2009). A lone district court opinion does not merit the time and attention of this Court.

B. This is a Poor Vehicle to Review the Application of Rule 4(d) Because Petitioner Failed to Comply with Rule 4(d)'s Requirements.

Separately, this case is a poor vehicle for exploring whether Rule 4(d)'s waiver provision applies to official capacity claims against state officers: The outcome of this case would be unchanged because petitioner's recovery of expenses under Rule 4(d)(2) is barred by his failure to comply with the mandatory procedural requirements of Rule 4(d)(1). The procedures imposed by Rule 4(d)(1) on plaintiffs are no less mandatory than, and are a predicate to, the requirement that a defendant pay the costs of service under Rule 4(d)(2).

First, Rule 4(d)(1)(C) and (D) require that the notice and request sent by a plaintiff contain both the waiver of service form and a separate document containing the "text prescribed in Form 5" informing the defendant of the consequences of waiver and non-waiver. While petitioner provided the waiver form, he did not provide any document containing the text prescribed in Form 5. Record Pages 181, 182, Opp. App. 10b-13b. When this failure was noted, petitioner argued to the lower courts that providing the Request for Waiver form required by Rule 4(d)(1)(C) (Form 6) alleviated his need to provide a separate notice "using the text prescribed in Form 5" as required by Rule 4(d)(1)(D). However, Rule 4(d)(1) directs that the "notice and request *must*" be in conformity with each subsection (A) through (G), which includes separate requirements to provide a notice using the text of Form 5 and the Form 6 waiver. Fed. R. Civ. P. 4(d)(1) (emphasis supplied). The rule does not make the two forms interchangeable. More, the 1993 Advisory

Committee notes indicate that the waiver form and notice form are separate and each must be provided: the "text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Forms 1A and 1B . . . ." Fed. R. Civ. P. 4 advisory committee note. The "Notice" and "Request for Waiver" forms referenced as 1A and 1B are now Forms 5 and 6, and the text of the rule along with the advisory committee notes indicate that *both* must be provided by plaintiffs seeking to invoke the cost-shifting provision of Rule 4(d)(2). Petitioner's admitted failure to abide by Rule 4(d)(1)'s mandatory procedures prohibits any recovery of costs under Rule 4(d)(2).

Rule 4(d) also requires that the notice and requested waiver must be provided to the defendant after the litigation has been commenced by the filing of the complaint. A defendant is not obligated to waive service when provided copies of an unfiled complaint and informed that plaintiff intends to file suit in the future. Specifically, the notice must "name the court where the complaint was filed." Fed. R. Civ. P. 4(d)(1)(B); *see also* Fed. R. Civ. P. 4(d)(1) ("plaintiff may notify such a defendant that an action has been commenced"); Form 5 ("Why are you getting this? A lawsuit has been filed against you, or the entity you represent in this court under the number shown above.") In this instance, petitioner mailed the requested waiver on September 15 but did not file the complaint until September 16. Opp. App. 10b; Pet 6. Petitioner's Waiver Request Form was incomplete, leaving blank the area requiring the disclosure of the cause number because no suit had yet been filed. Record Page 181, Opp. App. 11b. While in this matter

the suit was filed on September 16, Rule 4(d) does not task the defendant to check the district court docket to verify whether plaintiff has indeed filed his suit. Further, Rule 4(d) does not authorize a plaintiff to seek an anticipatory waiver for a suit that he intends to file in the future, whether it be one day, three months, or a year in the future.

Next, Rule 4(d)(1)(A)(i) and (d)(1)(G) require that the notice and request for waiver be in writing, addressed "to the individual defendant," and sent by first-class mail or other reliable means. Petitioner did not send the waiver request to the Secretary, but, instead, mailed the waiver to the Attorney General's Office and asked that it be delivered to the Secretary. Record Page 182, Opp. App. 10b. Petitioner did not accomplish the first task required under Rule 4(d) – provide the waiver request directly to the defendant.

Finally, even if petitioner's failures to follow the mandatory requirements of Rule 4(d)(1) do not directly prohibit his motion for costs, these failures provided the Secretary with "good cause" under Rule 4(d)(2) to refuse waiver without being subject to cost-shifting. *See* Fed. R. Civ. P. 4(d)(2) (providing cost-shifting only when the waiver is refused "without good cause").

Petitioner cannot benefit from the cost-shifting provisions of Rule 4(d)(2) when he admittedly failed to comply with the mandatory procedural requirements of Rule 4(d)(1). Petitioner cannot prevail in his claim for expenses without overcoming multiple procedural defects, yet there is no circuit split or other basis for this Court to review these defects. Because petitioner's motion for expenses fails on alternative grounds, this case is a singularly poor vehicle to

address the issues raised in the petition, even if they otherwise were grounds for this Court's review.

C. This is a Poor Vehicle for Review Because the Record is Undeveloped Regarding the Method of Service.

The petition asserts that after the Secretary declined to waive service, petitioner "served the secretary as an individual under Rule 4(e)." Pet. 8. In fact, the record does not reflect the manner in which the Secretary was served as no return of service was filed by the petitioner. According to the respondent's records, the complaint and summons were served upon the Office of the Attorney General, which would be consistent with Rule 4(j)(2)(b)'s authorization of "service in the manner prescribed by that state's law" and Miss. R. Civ. P. 4(d)(5)'s authorization of service upon an officer of the State of Mississippi "by delivering a copy of the summons and complaint to the Attorney General." It is without question that Rule 4(d)'s waiver provision is inapplicable to governmental entities served by means of Rule 4(j). Fed. R. Civ. P. 4(d)(1). There is no evidence in the record to support petitioner's claim that service was effected by personal service on the Secretary under Rule 4(e) and this Court lacks the necessary factual record to resolve that question. *Cf. Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (dismissing writ when record was revealed as inadequate to review the question presented).

II. Review of the Fifth Circuit's Reliance on *Pullman* Abstention is Not Warranted.

A. The Issue of *Pullman* Abstention verses Question Certification is Moot and the Relief Articulated in Petitioner's Supplemental Brief is Barred by the Eleventh Amendment.

Because the legislature has now amended Section 23-15-782(2) to cure the exact constitutional defect alleged to exist by petitioner, both the underlying cause of action and the more specific question regarding *Pullman* abstention is moot. Further, in light of the amendment, there exists no alleged on-going violation of federal law so that the newly fabricated relief set forth in petitioner's supplemental brief is barred by the Eleventh Amendment.

Although the complaint sought relief with respect to the 2008 presidential election, petitioner persuaded the Fifth Circuit that the complaint was not moot because the 5:00 p.m. deadline will be enforced again in September 2012. Petitioner's argument became that the Secretary will close his office at 5:00 p.m. on the sixtieth day before the November 2012 election, and because such a 5:00 p.m. deadline is not explicitly set forth in Section 23-15-785(2), the Secretary would again be usurping the Mississippi legislature's authority under Art. II, § 1, cl. 2 to direct the manner of appointment of presidential electors. *See* Pet. 6. Petitioner's constitutional challenge rests solely on the alleged lack of legislative authorization. As the district court memorialized, "Plaintiffs conceded at oral argument that closing at 5:00 p.m., 6:00 p.m., or midnight would all be constitutional under the

Fourteenth Amendment. Thus, Plaintiffs' argument is that the Secretary's alleged violation of Section 23-15-785(2) is the sole basis for the constitutional claim." Opp. App. 8b.

The legislature's 2010 amendment to Section 23-15-785(2) explicitly requiring presidential petitions to be filed by 5:00 p.m. on the sixtieth day before the general election renders petitioner's complaint for prospective relief moot. In light of the amendment, there can be no dispute that the Secretary's closure of his office at 5:00 p.m. in September 2012 will be consistent with the legislature's direction for the manner of appointment of presidential electors. There is no effectual relief available to petitioner regarding the 5:00 p.m. deadline. Without a live controversy to review, certiorari on the question of *Pullman* abstention should be denied. *See, e.g.*, *Church of Scientology of California v. U.S.*, 506 U.S. 9, 12 (1992) ("if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed" as moot (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Thirty days after the amendment to Section 23-15-785(2) was signed into law, and on the last business day before the respondent's opposition was due, petitioner filed a supplemental brief belatedly addressing this clearly fatal development. Petitioner contends that this matter is not moot based on the "voluntary cessation" line of cases. Supp. Pet. 2 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)). In *City of Mesquite*, plaintiffs filed a federal court constitutional challenge to an ordinance governing amusement establishments. *Id.* at 288.

During the litigation, the city repealed the challenged ordinance and sought to dismiss the case as moot. *Id.* This Court found the matter was not moot because the city could simply reenact "precisely the same provision" once the federal challenge was dismissed. *Id.* at 289. The possibility that the defendant would await the dismissal of the complaint and then resume the same allegedly unconstitutional conduct was a sufficient reason to find the action not to be moot. *Id.* at 289 n.10. But, this Court did recognize that a voluntary cessation will moot a claim if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* The Mississippi legislature's amendment mandating a 5:00 p.m. deadline makes it absolutely clear that the allegedly wrongful behavior of an "unauthorized" 5:00 p.m. deadline could not reasonably be expected to recur.

Nonetheless, petitioner purposefully confuses a voluntary cessation of challenged conduct with a change in the statute to remedy the alleged constitutional defect. The former may not moot a case, the latter undoubtably will. The Secretary has not voluntarily ceased closing his office at 5:00 p.m. in order to moot the challenge. Instead, the legislature has now amended state law to unquestionably authorize the Secretary to enforce a 5:00 p.m. deadline. In each of the four voluntary cessation cases cited by petitioner, the defendant abandoned or altered the challenged behavior. None of those cases addressed mootness when the alleged constitutional defect is remedied by legislative changes to the governing statute. In this matter, the amendment, without question, remedied the specific and only alleged constitutional defect challenged by the

petitioner: That the Secretary lacked legislative authorization under Section 23-15-785(2) to close at 5:00 p.m. Opp. App. 8b. Although petitioner appeals to the rationale of *City of Mesquite*, he offers no explanation of how an "unauthorized" 5:00 p.m. deadline may reoccur in 2012 in light of the legislature's explicit authorization of such a deadline.

The controlling precedents here are the numerous cases holding that when the challenged law is revised so as to cure the alleged defect, there remains no live controversy to adjudicate under Article III. *See Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) ("substantia[l] amend[ment]" of challenged regulation mooted controversy over its validity); *Kremens v. Bartley*, 431 U.S. 119, 128-130 (1977) (challenge to law permitting parents to commit juveniles under 18 to mental hospital mooted, with respect to those over 13, by new legislation permitting such commitment only of juveniles 13 and under); *Board of Pub. Util. Comm'rs v. Compañia General De Tabacos De Filipinas*, 249 U.S. 425, 426 (1919) (challenge to statute alleged to constitute unlawful delegation of legislative power to regulatory board dismissed after statutory amendment detailed board's responsibilities); *see also Department of Treasury v. Galioto*, 477 U.S. 556, 559-560 (1986) (equal protection challenge to federal firearms statute treating certain felons more favorably than former mental patients moot after Congress amended statute to eliminate discrimination). With respect to mootness and statutory amendments, this Court has instructed that it will review the "statute as it now stands, not as it once did." *Hall v. Beals*, 396 U.S. 45, 48 (1969). Because the statute, as amended, clearly authorizes the Secretary's 5:00 p.m. deadline, "the case has

therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *See id.*

Petitioner's final supplemental argument asserts that "even if the statutory change were to moot Petitioner's challenge to the Secretary's 5:00 p.m. deadline," petitioner is entitled to a generalized declaratory judgment that "the Secretary does not have authority under Article II . . . to regulate presidential elections." Supp. Pet. 3. Although petitioner asserts that this "procedural feature" of his case is unrelated to the 5:00 p.m. deadline, petitioner did not identify *any* act of the Secretary other than closing at the 5:00 p.m. as the basis for his federal constitutional claim. *See* Opp. App. 8b. Petitioner asserts that the amendment to Section 23-15-785(2) "does not address the Secretary's authority" to adopt future, yet unknown, deadlines that might run afoul of Article II of the constitution so that petitioner is entitled to a general judgment declaring that the Secretary does not have authority to "regulate presidential elections." Supp. Pet. 4. The most obvious flaw in this argument, of which there are many, is that the Eleventh Amendment prohibits all relief against state officials based solely on past acts and prohibits all prospective relief unless there exists an on-going violation of federal law. *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974); *Green v. Mansour*, 474 U.S. 64, 68-69 (1985). It is critical that, in light of the amendment, petitioner cannot alleged an on-going violation of federal law. The Eleventh Amendment prohibits relief premised on a past violation of federal law and petitioner cannot perform an "end run" around this clear prohibition by seeking "notice relief" or other

forms of relief seeking to "deter[]" possible future misconduct or to instruct state officials on federal law. *See Green*, 474 U.S. at 68-69, 73.

Finally, even if the entire suit is not moot, the question of whether *Pullman* abstention or certification was appropriate is unquestionably moot. The clarification to Section 23-15-785(2) makes state law unmistakably clear so that neither *Pullman* abstention nor certification is now appropriate. Both certification and *Pullman* abstention require the existence of an "uncertain question of state law," such as an ambiguous statute. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984) (noting *Pullman* abstention is limited to uncertain questions of state law); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 470 (1987) (declining to certify question when statute was not ambiguous). The amendment to Section 23-15-785(2) removes any doubt as to the deadline by which presidential qualifying petitions must be filed so that neither *Pullman* abstention nor certification is appropriate. At this point, review of the Fifth Circuit's decision regarding *Pullman* abstention would be an advisory opinion.

B. If Not Moot, the Fifth Circuit's Abstention Under *Pullman* was a Factually Dependent Decision Unsuitable for Review.

The traditional concerns regarding *Pullman* abstention are absent from this unique litigation. This Court has noted a concern that *Pullman* may "entail[] a full round of litigation in the state court system before any resumption of proceedings in federal court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). In this matter, such would not be the case.

Petitioner's federal claim is premised on the Secretary's alleged violation of state statutory law by closing at 5:00 p.m. Pet. 6. Thus, if the petitioner prevailed in state court on his allegation that the Secretary acted in violation of state law, the state court would grant him complete relief by directing the Secretary to act in conformity with state law. Indeed, an order requiring compliance with state law is not available in federal court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.") As a practical matter, there would be no reason to return to federal court as the federal court could grant no additional relief. Moreover, because any future alleged injury to petitioner would not occur until the next presidential qualifying deadline in September 2012, there was ample time for the state court to resolve this matter of state law. The federal litigation itself was in a nascent stage, having not progressed beyond the filing of an answer and a denial of the preliminary injunction motion. *Pullman* abstention fit the unique context of this litigation and the Fifth Circuit's invocation of Pullman abstention was a fact-bound application of a legal standard generally considered inappropriate for review by this Court. *See, e.g., Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320-21 (1994); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 34 (1993).

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

MISSISSIPPI LEGISLATURE

REGULAR SESSION 2010

By: Senator(s) Burton To: Elections

SENATE BILL NO. 3058

AN ACT TO AMEND SECTION 23-15-785, MISSISSIPPI CODE OF 1972, TO REQUIRE THAT CERTIFICATES OF NOMINATION AND NOMINATING PETITIONS FOR CANDIDATES FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES MUST BE FILED IN THE OFFICE OF THE SECRETARY OF STATE BY NOT LATER THAN 5:00 P.M. 60 DAYS PRIOR TO THE ELECTION; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 23-15-785, Mississippi Code of 1972, is amended as follows:

23-15-785. (1) When presidential electors are to be chosen, the Secretary of State of Mississippi shall certify to the circuit clerks of the several counties the names of all candidates for President and Vice President who are nominated by any national convention or other like assembly of any political party

or by written petition signed by at least one thousand (1,000) qualified voters of this state.

(2) The certificate of nomination by a political party convention must be signed by the presiding officer and secretary of the convention and by the chairman of the state executive committee of the political party making the nomination. Any nominating petition, to be valid, must contain the signatures as well as the addresses of the petitioners. The certificates and petitions must be filed with the State Board of Election Commissioners by filing them in the Office of the Secretary of State by 5:00 p.m. not less than sixty (60) days previous to the day of the election.

(3) Each certificate of nomination and nominating petition must be accompanied by a list of the names and addresses of persons, who shall be qualified voters of this state, equal in number to the number of presidential electors to be chosen. Each person so listed shall execute the following statement which shall be attached to the certificate or petition when it is filed with the State Board of Election Commissioners: "I do hereby consent and do hereby agree to serve as elector for President and Vice President of the United States, if elected to that position, and do hereby agree that, if so elected, I shall cast my ballot as such for _____ for President and _____ for Vice President of the United States" (inserting in said blank spaces the respective names of the persons named as nominees for said respective offices in the certificate to which this statement is attached).

(4) The State Board of Election Commissioners and any other official charged with the preparation of

official ballots shall place on such official ballots the words "PRESIDENTIAL ELECTORS FOR (here insert the name of the candidate for President, the word 'AND' and the name of the candidate for Vice President)" in lieu of placing the names of such presidential electors on the official ballots, and a vote cast therefor shall be counted and shall be in all respects effective as a vote for each of the presidential electors representing those candidates for President and Vice President of the United States. In the case of unpledged electors, the State Board of Election Commissioners and any other official charged with the preparation of official ballots shall place on such official ballots the words "UNPLEDGED ELECTOR(S) (here insert the name(s) of individual unpledged elector(s) if placed upon the ballot based upon a petition granted in the manner provided by law stating the individual name(s) of the elector(s) rather than a slate of electors)."

SECTION 2. The Attorney General of the State of Mississippi shall submit this act, immediately upon approval by the Governor, or upon approval by the Legislature subsequent to a veto, to the Attorney General of the United States or to the United States District Court for the District of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended.

SECTION 3. This act shall take effect and be in force from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.

ST: Certificates of nomination and nominating petitions for President and V.P.; must be filed not later than 5:00 p.m. on the deadline day.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:08cv573 TSL-JCS

[Filed September 29, 2008]

BRIAN MOORE, STEWART ALEXANDER and THE NATURAL LAW PARTY OF MISSISSIPPI PLAINTIFFS	)
V.	)
DELBERT HOSEMANN, in his official capacity as Mississippi Secretary of State DEFENDANT	)

ORDER DENYING PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction. The issue has been fully briefed and was the subject of a hearing at which testimony was provided by Plaintiff Brian Moore and argument was submitted by counsel. As more fully set forth in the opinion rendered from the bench, this

Court finds that the motion is not well taken and should be denied.

It is the Plaintiffs' burden to prove each of the four traditional elements in order to be entitled to a preliminary injunction: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs the threatened harm to the non-movant; and (4) that the injunction will not disserve the public interest. DSC Communications Corp. v. DGI Technologies, Inc., 81 F.3d 597, 600 (5th Cir. 1996). As this Court finds that Plaintiffs have not established a substantial likelihood of success on the merits, a preliminary injunction cannot be issued.

Mississippi Code Section 23-15-785(2) requires that Plaintiffs' qualifying documentation for inclusion as presidential and vice-presidential candidates must be filed with the office of the Secretary of State not less than sixty (60) days prior to the day of the general election. All parties agree that September 5, 2008, was the last day on which Plaintiffs could filed the documentation with the Secretary of State. Although Section 23-15-785(2) does specify a time of day by which the documents must be filed, the Secretary of State closed his office at the regular hour of 5:00 p.m. on September 5. Shortly after 5 p.m., taxicab drivers hired by Plaintiffs arrived at the Secretary's offices to file but found the doors locked. The drivers left the documents on the front step of the office.

Mr. Moore testified that prior to September 5 he was aware of the 5:00 p.m. deadline. Shortly before 5:00 p.m., Mr. Moore testified that he telephoned the Secretary of State's office to inform them that his

documents would not arrive by 5:00 p.m. and inquired about whether a late filing would be accepted. Mr. Moore states that he was informed that a late filing would be accepted. By affidavit, the relevant official at the Secretary of State's office denied telling Mr. Moore that a late filing would be accepted.

For purposes of resolving the motion for preliminary injunction, this Court finds that Plaintiffs have failed to state a cause of action under the Fourteenth Amendment or Article II of the Constitution. The Court further finds that Plaintiffs have failed to state a claim for constitutional estoppel and that the Court is unlikely to exercise supplemental jurisdiction over Plaintiffs' purely state law claims in light of the legal deficiencies in the federal law claims.

First, Plaintiffs assert that the Secretary of State's decision to close his office at the traditional hour of 5:00 p.m. when such a deadline is not explicitly set for in Section 23-15-785(2) was a usurpation of the Mississippi Legislature's authority under Art. II, § 1, cl. 2 to direct the manner of appointment for presidential electors. The authorities cited by Plaintiffs, namely Bush v. Gore, 531 U.S. 98 (2000), and Libertarian Party of Ohio v. Brunner, – F.Supp.2d –, 2008 WL 2795576 (S.D.Ohio July 17, 2008), provide, at best, that federal courts will review state actions that are a significant departure from, or go beyond a fair reading of, state election laws. In this matter, the Secretary of State's interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes.

Next, Plaintiffs assert that Secretary of State's decision to close at 5:00 p.m. violates the substantive and procedural guarantees of the Fourteenth Amendment. With respect to substantive due process, Plaintiffs conceded at oral argument that closing at 5:00 p.m., 6:00 p.m., or midnight would all be constitutional under the Fourteenth Amendment. Thus, Plaintiffs' argument is that the Secretary's alleged violation of Section 23-15-785(2) is the sole basis for the constitutional claim. However, the mere violation of a state election law standing alone is not a violation of the Fourteenth Amendment. Snowden v. Hughes, 321 U.S. 1, 11 (1944); Duncan v. Poythress, 657 F.2d 691, 699 -700 (5th Cir. 1981). Not only does that Court find the decision to close at 5:00 p.m. to be consistent with state law, even if it was contrary to the state law, it would not constitute one of the "rare, but serious, violations of state election laws that undermine the basic fairness and integrity of the democratic system" warranting relief under the Fourteenth Amendment. See Duncan, 657 F.2d at 699-700. Further, as Mr. Moore testified that he was aware of the 5:00 p.m. deadline well prior to September 5, there is no viable claim premised on procedural due process.

Third, Plaintiffs assert a claim of constitutional estoppel based on the argument that the Secretary of State is estopped from refusing the qualifying documents because the Secretary's office allegedly stated to Mr. Moore that a late filing would be accepted. The Court finds that estoppel cases cited by the Plaintiff to be wholly inapplicable to the facts of this matter. Further, Mr. Moore's testimony revealed that there was no detrimental reliance on the alleged assurance. It was not until after Mr. Moore realized

that his documentation would not be filed by 5:00 p.m. that the alleged statement was made by the Secretary's office. Thus, Mr. Moore did not change his course of conduct to his detriment based on that alleged assurance.

Finally, this Court is doubtful that it will retain Plaintiffs' state law related claims once disposing of the constitutional allegations. Further, the Eleventh Amendment does not allow for any relief, prospective or otherwise, to be granted in federal court on solely on the basis of state law violations. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984). Plaintiffs' state law claims properly belong in state court.

Thus, finding that the Plaintiffs have failed to demonstrate a likelihood of success on the merits, the motion for preliminary injunction is hereby DENIED.

So ORDERED, this the 29th day of September, 2008

/s/Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX C

303 E. Broad Street
Columbus, OH 43215

September 15, 2008

Harold Pizetta
Mississippi Attorney General's Office
Walter Sillers Building
550 High Street, Suite 1200
Jackson, MS 39201

Dear Mr. Pizzetta.

Enclosed are the pleadings we discussed on the phone today. I also have sent you electronic copies.

I have also enclosed two Waivers of Service and a return envelope. If you could have the Secretary sign one and mail to me in the envelope, that would save the cost of Service per the Federal Rules.

Should the Secretary choose not to Waive, please let me know and I will arrange Service.

Sincerely,

Mark R. Brown
Attorney at Law

Enclosures.

AO 399 (Rev. 10/95)

WAIVER OF SERVICE OF SUMMONS

TO: Mark R. Brown
(NAME OF PLAINTIFF'S ATTORNEY OR UNREPRESENTED PLAINTIFF)

I, Delbert Hosemann, acknowledge
(DEFENDANT NAME)

receipt of your request that I waive service of summons in the action of Moore, et al. v. Hosemann,
(CAPTION OF ACTION)

which is case number _____
(DOCKET NUMBER)

in the United States District Court for the Souther District of Mississippi.

I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections

based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after September 15, 2008,
(DATE REQUEST WAS SENT)

or within 90 days after that date if the request was sent outside the United States.

_____ _____
(DATE) (SIGNATURE)

Printed/Typed Name: _____

As _____ of _____
(TITLE) (CORPORATE DEFENDANT)

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper

place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

Court, U.S.
APR 13 2010

No. 09-982

In The

Supreme Court of the United States

BRIAN MOORE,

Petitioner,

v.

DELBERT HOSEMANN,
Mississippi Secretary of State,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 4(e)'s provision for service of process on individuals applies to official-capacity actions filed against state officers under the logic of *Ex parte Young*.

2. Whether state certification in the absence of unusual circumstances should be preferred to abstention under *Railroad Commission v. Pullman Company*.

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New Mississippi law sets deadline for prez candidates, SUN HERALD, March 19, 2010 1

On March 17, 2010, Mississippi's Legislature approved an amendment to § 23-15-785(2) of the Mississippi Code, specifically providing that presidential candidates' qualifying papers must be delivered to the Secretary "by 5:00 p.m. not less than sixty (60) days previous to the day of the election." *See* Miss. 2010 Session Laws (S.B. No. 3058) (March 17, 2010) (WL No. 91). According to news reports, the Governor signed this bill on March 19, 2010. *See* New Mississippi law sets deadline for prez candidates, SUN HERALD, March 19, 2010.

REASONS FOR GRANTING THE WRIT

Petitioner's case has not been mooted by Mississippi's March 19, 2010 statutory change for the following reasons:

1. Mississippi's change to its filing deadline cannot moot Petitioner's claim to damages – in the form of costs and attorney's fees – under Rule 4(d). *See Los Angeles v. Lyons,* 461 U.S. 95, 109 (1983); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 478 n.1 (1989); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007). Consequently, Petitioner's claim that the Fifth Circuit erroneously ruled that Rules 4(e) and 4(d) do not apply to state officials sued in their official capacities under 42 U.S.C. § 1983 for prospective relief is not moot.

2. Mississippi's proposed change to § 23-15-785(2) of the Mississippi Code must be pre-cleared under § 5 of the federal Voting Rights Act, 42 U.S.C. § 1973c, before it can become effective. As of March 29, 2010, it has not been submitted for pre-clearance,[1] let alone cleared by the Department of Justice. (The Department of Justice ordinarily requires at least sixty days to clear changes to election laws.) Consequently, Mississippi's proposed change has not mooted Petitioner's challenge to the Secretary's interpretation of § 23-15-785(2) and the Fifth Circuit's abstention order under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941).

3. Assuming that the change to § 23-15-785(2) becomes effective, it still will not moot Petitioner's challenge. This Court has stated on several occasions that voluntary changes to policies and statutes do not moot constitutional challenges. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) ("now, as then, the mootness question is controlled by . . . the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a

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[1] *See* http://www.justice.gov/crt/voting/notices/noticepg.php.

federal court of its power to determine the legality of the practice'"); *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174 (2000) ("A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."); *City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) ("voluntary cessation of a challenged practice rarely moots a federal case"); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007) ("Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' a heavy burden that Seattle has clearly not met.").

Mississippi's voluntary change on March 19, 2010, which came one month after this Petition was filed (and coincidentally on the day this Court called for a response), was obviously designed to moot Petitioner's challenge. As the cited cases demonstrate, this Court has been hesitant to afford defendants this power – especially where the voluntary act is obviously designed to cause mootness.

4. Even if the statutory change were to moot Petitioner's challenge to the Secretary's 5:00 PM deadline, it does not moot Petitioner's procedural claim that the Secretary does not have authority under Article II of the Constitution to regulate presidential elections. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding that procedural challenge was proper even though no substantive harm

occurred); *Memphis Community School District v. Stachura*, 477 U.S. 299, 304 (1986) (same); *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (same). Mississippi's statutory change does not address the Secretary's authority under Mississippi law and Article II, § 1 cl. 2, of the United States Constitution to change legislatively-enacted deadlines. Consequently, this aspect of Petitioner's challenge remains alive. *See, e.g., Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001) (holding that "post-judgment alterations to legislative enactments" might "moot a case to the extent they remove certain challenged features, but do not moot a case if they leave other challenged features substantially undisturbed"). Even if Mississippi's statutory change moots Petitioner's challenge to the substance of the Secretary's decision (i.e., the 5:00 PM deadline), it does not affect the procedural feature of Petitioner's case – that is, whether the Secretary has authority to regulate presidential elections.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 4(e)'s provision for service of process on individuals applies to official-capacity actions filed against state officers under the logic of *Ex parte Young*.

2. Whether state certification in the absence of unusual circumstances should be preferred to abstention under *Railroad Commission v. Pullman Company*.

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Michael Ashton, Note, *Recovering Attorneys' Fees With the Voluntary Cessation to Mootness Doctrine After* Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2002 Wis. L. Rev. 965 6

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split Over Whether Rule 4(e) Applies to State Officials Sued in their Official Capacities for Prospective Relief Under 42 U.S.C. § 1983.

Respondent concedes the circuit-split over Rule 4(e)'s application to prospective actions filed against state officials in their official capacities under 42 U.S.C. § 1983. *See* Brief in Opposition at 15. He hopes to divert the Court's attention from this split, however, by arguing that Rule 4(d)'s application presents no clear split in the circuits. *See* Brief in Opposition at 10.

The question presented in this case is "[w]hether Federal Rule of Civil Procedure 4(e)'s provision for service of process on individuals applies to official-capacity actions filed against state officers under the logic of *Ex parte Young*." *See* Petition for A Writ of Certiorari at i. Because a circuit-split exists over the question presented, certiorari is proper. To be sure, Rule 4(d)'s application in this case depends in part on the answer to this question. *See, e.g., Marcello v. Maine*, 238 F.R.D. 113 (D. Me. 2006). But so do many procedural matters. *See, e.g., Caisse v. DuBois*, 346 F.3d 213 (1st Cir. 2003); *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24 (1st Cir. 1988); *Stoianoff v. Commissioner of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (Table) (2000 WL 287720). That additional circuit-splits involving derivative questions have yet to arise does not counsel against resolving the circuit-split at hand.

Respondent also argues that certiorari is not warranted because Petitioner did not comply with Rule 4(d). *See* Brief in Opposition at 17-20.[1] He attempts to use factual disputes to cloud the clear legal question presented. Neither court below, however, saw fit to address the disputed facts raised by Respondent, let alone resolve them. Petitioner was denied costs and attorney's fees because Rule 4(e), the Fifth Circuit ruled, does not apply to state officials sued in their official capacities. Assuming this legal question is resolved in Petitioner's favor by this Court, Respondent will, of course, have the opportunity to raise his factual defenses on remand.[2] These factual challenges do not now stand in the way of the legal question presented.

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[1] Respondent's attempt at belatedly impeaching Petitioner's service of process is also of no avail. *See* Brief in Opposition at 20. Putting aside the disputed factual nature of this claim, as well as Respondent's waiver of any challenge to service of process (by not raising it in the district court, *see* Rule 12(h)(1)), Respondent concedes that Petitioner properly served Respondent through Mississippi's Attorney General pursuant to Mississippi law. *See* Brief in Opposition at 20. This mode of service is authorized by Rule 4(e)(1), which borrows local service provisions. Respondent was therefore, by his own admission, properly served under Rule 4(e).

[2] Respondent does not argue, nor could he, that Mississippi's change to its filing deadline moots Petitioner's claim to costs and attorney's fees under Rule 4(d). He therefore apparently agrees with Petitioner that mootness is not a problem in regard to Petitioner's first Question Presented. *See* Petitioner's Supplemental Brief at 1.

II. Preferring Abstention Over Certification Contradicts This Court's Instructions and Practices in Other Circuits.

Respondent concedes that the Fifth Circuit's preference for abstention (under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)) over certification contradicts this Court's holding in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), as well as the practices of every other circuit court. *See* Brief in Opposition at 21. At least, he does not claim to the contrary. He argues instead that the question was rendered moot by Mississippi's change in its filing deadline,[3] *see* Brief in Opposition at 21, and is otherwise barred by the Eleventh Amendment. *Id.* at 25.

The Eleventh Amendment poses no obstacle here. Petitioner filed suit against Respondent in his official capacity for prospective relief under 42 U.S.C. § 1983 using the logic of *Ex parte Young*, 209 U.S. 123 (1908), and the holding in *Will v. Michigan Department of*

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[3] Contrary to Respondent's assertion, *see* Brief in Opposition at 8, Petitioner has not claimed that Mississippi's legislative change was "dastardly," nor precipitated by this Court's call for a response. Petitioner stated in his Supplemental Brief that this timing was coincidental. Still, it remains obvious that the change was motivated by the Fifth Circuit's ruling that the matter was not moot and could proceed in the district court (subject to *Pullman* abstention). Respondent concedes this fact, *see* Brief in Opposition at 8-9, and therefore admits that the legislature's change was motivated by its desire to resolve the case.

State Police, 491 U.S. 58 (1989). The Eleventh Amendment, under the circumstances described in these cases, does not stand in the way of prospective relief awarded under 42 U.S.C. § 1983 and the federal Constitution. Petitioner clearly claims that Respondent's fixing a new deadline for presidential elections violates Article II of the United States Constitution. He seeks declaratory and injunctive relief. He does not claim damages. His claim fits neatly within the *Ex parte Young* exception to the Eleventh Amendment.

Respondent broadly argues that "the Eleventh Amendment prohibits all relief against state officials based solely on past acts and prohibits all prospective relief unless there exists an on-going violation of federal law." Brief in Opposition at 25. This charge cannot withstand this Court's voluntary cessation jurisprudence – which is premised on government's subsequently coming into compliance with federal law, *see, e.g., City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) ("now, as then, the mootness question is controlled by . . . the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice'") – and contradicts this Court's "capable of repetition"

doctrine – which assumes the absence of an on-going violation. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000) (describing how mootness is different from standing).

Cases like *Aladdin's Castle* and *Northeastern Florida Chapter of Associated General Contractors* prove that federal judicial authority to award prospective relief under the Constitution and 42 U.S.C. § 1983 continues even after a governmental entity voluntarily changes its laws. No Supreme Court case holds that the Eleventh Amendment "pops up" to ban prospective relief once a state voluntarily changes its laws to comply with federal norms.[4] The question is one of Article III mootness; not the Eleventh Amendment's bar to suits against states.

As stated in Petitioner's Supplemental Brief, this Court has repeatedly invoked the voluntary cessation doctrine to overcome mootness. *See, e.g., City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1

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[4] Respondent relies on *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), and *Green v. Mansour*, 474 U.S 64, 68-69 (1985), to support this odd proposition *See* Brief in Opposition at 25. *Edelman* ruled that the Eleventh Amendment protects states from retroactive awards of social security benefits. *Green* ruled that plaintiffs cannot attempt an "'end run' around . . . *Edelman*," 474 U S. at 73, by using federal declaratory relief to support state court orders of money benefits. (In *Green*, injunctive relief against state officials had been mooted by changes in federal – not state – law. Hence, the voluntary cessation doctrine did not apply.) Neither case supports Respondent's point Petitioner does not claim money damages of any sort.

(2001) ("voluntary cessation of a challenged practice rarely moots a federal case"); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007). Respondent rejects these cases in favor of older precedents, like *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam). *See* Brief in Opposition at 24. Petitioner concedes that these older cases lend support to Respondent's claim.[5] However, this Court's more recent precedents uniformly reject mootness in the face of voluntary changes. Under this Court's recent

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[5] One commentator has observed that while "Supreme Court dicta seems to state that such legislative action does fall within the voluntary cessation exception," Michael Ashton, Note, *Recovering Attorneys' Fees With the Voluntary Cessation to Mootness Doctrine After* Buckhannon Board and Care Home, Inc v. West Virginia Department of Health and Human Resources, 2002 Wis L Rev. 965, 988, "the Supreme Court has yet to hold . . . that legislative repeal or amendment of a challenged law falls within the voluntary cessation exception." *Id.* Ashton further notes that lower federal courts tend to conclude under these circumstances that cases are rendered moot by legislative change. *Id.* at 988-89 *See also Zessar v. Keith*, 536 F.3d 788, 793 (7th Cir. 2008) ("any dispute over the constitutionality of a statute becomes moot if a new statute is enacted in its place during the pendency of the litigation, and the plaintiff seeks only prospective relief"). Petitioner stands by the most recent Supreme Court precedent *See, e.g., Doctor John's, Inc. v. City of Sioux City, Iowa*, 389 F Supp.2d 1096, 1113 (N.D. Iowa 2005) ("The City's contention that the general rule is that repeal of an ordinance moots challenges to that ordinance is contrary to Supreme Court precedent"). If there remains doubt over the voluntary cessation doctrine's application to legislative change, Petitioner respectfully suggests that the question might be better carried with the case to full argument.

holdings, Mississippi's voluntary change does not moot Petitioner's constitutional challenge to the deadline that Respondent claims existed in 2008.[6]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

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[6] Even assuming that Petitioner's substantive challenge to the 5:00 PM deadline is rendered moot, Petitioner's procedural challenge to Respondent's constitutional authority to declare this deadline remains. *See* Petitioner's Supplemental Brief at 3-4